ORAL ARGUMENT NOT YET SCHEDULED

Nos. 18-1085 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CALIFORNIA COMMUNITIES AGAINST TOXICS, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON PETITION FOR REVIEW OF ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESPONDENTS' INITIAL BRIEF

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December 21, 2018

Certificate as to Parties, Rulings, and Related Cases

Respondents the United States Environmental Protection Agency and Scott Pruitt submit this certificate as to parties, rulings, and related cases under D.C. Circuit Rule 27(a)(4).

(A) Parties and Amici to these Petitions for Review

Parties: Petitioners have identified all Petitioners, Respondents, and Intervenors in these consolidated petitions for review in their briefs.

Amici: The American Chemistry Council, American Petroleum Institute, American Wood Council, Chamber of Commerce of the United States of America, Council of Industrial Boiler Owners, and the National Association of Manufacturers filed a notice of intent to participate as amicus curiae on October 29, 2018. Doc. #1757585.

(B) Rulings Under Review

These consolidated petitions challenge an EPA Guidance Memorandum issued by William L. Wehrum, dated January 25, 2018, and entitled "Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act." A copy of that Guidance is attached to this brief.

(C) Related Cases

None.

Table of Authorities

Cases

*Authorities chiefly relied upon are marked with an asterisk.

Statutes

Code of Federal Regulations

Federal Registers

Other Authorities

Glossary

CAA	Clean Air Act
EPA	The United States Environmental Protection Agency
GACT	Generally Available Control Technology
MACT	Maximum Achievable Control Technology

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INTRODUCTION

In enacting the Clean Air Act's ("CAA's") hazardous air pollutant program, Congress defined the statutory term "major source" quite simply. A major source "emits, or has the potential to emit considering controls, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). The statute's definition of "area source" is even simpler; an area source is "any" stationary source of hazardous air pollutants that is "not a major source." Id. § 7412(a)(2). Those straightforward definitions include no cut-off date. They do not state a source must emit below the 10/25 tons-per-year thresholds by a certain point in time to qualify as an area source and be regulated accordingly.

The guidance memorandum challenged in these cases (the "2018 Guidance") does nothing more than reiterate what the statute makes clear. A major source that reduces its hazardous air pollutant emissions and potential to emit below the 10/25 tons-per-year thresholds is an "area source," regardless of when it does so. In so stating, EPA corrected an error the Agency made in 1995 when it issued a prior guidance memorandum (the "1995 Guidance"). This read into the statute a deadline (which Congress itself did not impose) for sources to reduce their potential to emit below the statutory thresholds in order to be regulated as area sources.

EPA's correction of that position does not make the 2018 Guidance more than what it is. It is an interpretive document that simply informs EPA's regional offices, states, and the public that EPA will now apply the statutory definitions of "major source" and "area source" as Congress wrote them. Thus, the 2018 Guidance—like the 1995 Guidance—is neither a legislative rule nor final agency action subject to judicial review. Stakeholders will have a full opportunity to challenge EPA's reading elsewhere. The Agency intends to conduct a notice-and-comment rulemaking to add regulatory text reflecting its plain language reading. In the meantime, persons can contest the application of EPA's reading of the major and area source definitions by objecting or challenging when individual sources seek to change their status.

In short, the 2018 Guidance is not final agency action, and it is therefore not subject to judicial review. It is also not a legislative rule requiring notice-and-comment rulemaking. In any event, the 2018 Guidance is sound on the merits. It simply conveys that the Agency intends to read Congress' definitions of "major" and "area" sources as written. Petitioners' challenges therefore fail and should be either dismissed or denied.

STATEMENT OF JURISDICTION

These petitions for review were filed in this Court within the time provided under the CAA's judicial review provision, 42 U.S.C. § 7607(b). However, the Court lacks jurisdiction because, as discussed in Section I below, the 2018 Guidance is not final agency action subject to judicial review.

ISSUES PRESENTED FOR REVIEW

1. Is a guidance memorandum that conveys the EPA's plain language reading of a statutory provision for application in subsequent regulatory actions a legislative rule that creates new substantive law and therefore requires notice-and-comment rulemaking, or merely an interpretive rule?

2. Is an EPA guidance that states the Agency's reading of a statutory provision a final agency action subject to immediate judicial review even though (a) it creates no rights and imposes no obligations beyond those communicated by the statute and (b) the issue raised here will be addressed further in an upcoming rulemaking and can be challenged in the context of individual permitting decisions or other regulatory actions in the interim?

3. If the 2018 Guidance is final agency action subject to review, did EPA correctly read the CAA Section 112 definitions of "major source" and "area source"—which contain no deadline or cut-off date—as barring EPA from prohibiting major sources from reclassifying as area sources, even if they limit their emissions below the 10/25 tons-per-year thresholds?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are set forth in the Statutory and Regulatory Addendum. The 2018 Guidance is also attached to this brief.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

Congress first enacted CAA Section 112, 42 U.S.C. § 7412(b), addressing the emission of hazardous air pollutants, in 1970. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685. But the CAA hazardous air pollutant program was "established in its current form" in 1990. Michigan v. EPA, 135 S. Ct. 2699 (2015). Congress substantially revamped it at that time to accelerate regulation and reduce the Agency's discretion in certain respects. See White Stallion Energy Center, LLC v. EPA, 748 F.3d 1222, 1230 (D.C. Cir. 2014) (discussing history of CAA Section 112 hazardous air pollutant program).

In CAA section 112(b)(1), Congress identified close to two hundred hazardous air pollutants. 42 U.S.C. § 7412(b)(1). In section 112(c), Congress required EPA to list all categories of "major" sources of those pollutants and certain categories of "area" sources. 42 U.S.C. § 7412(c)(1), (3) & (6).

Major sources are defined as:

> [A]ny stationary source or group of stationary sources . . . that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

42 U.S.C. § 7412(a)(1).[1] In turn, an "'area source' is any stationary source of hazardous air pollutants that is not a major source." Id. § 7412(a)(2). The Administrator was instructed to "publish, and [] from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories or subcategories of major sources and area sources." Id. § 7412(c)(1).

"Major sources" are subject, with limited exceptions,[2] to emissions controls that "shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator . . . determines is achievable for new or existing sources." 42 U.S.C. § 7412(d)(2). These are called "maximum achievable control technology" or "MACT" standards. They reflect the level of emission control achieved by the best-controlled sources in the category. Id.; 42 U.S.C. § 7412(d)(3). MACT and other standards applicable to a major source are set forth

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[1] As quoted above, the major source thresholds are based on a source's actual emissions *or* "potential to emit considering controls"—i.e., the maximum emissions the source may produce under governmentally enforceable limits. See 40 C.F.R. § 63.2; Nat'l Mining Ass'n v. EPA, 59 F.3d 1351, 1362 (D.C. Cir. 1995). For simplicity, in this brief EPA will use the term "potential to emit" to encompass both actual emissions and the potential to emit.

[2] See 42 U.S.C. § 7412(d)(4) (allowing EPA to set health-based standards for certain pollutants); 42 U.S.C. § 7412(h)(allowing EPA to set work practice-based standards in certain circumstances).

in the source's Title V operating permit, which collect all applicable federal air emission requirements. 42 U.S.C. §§ 7661a(a), 7661c(a).

EPA must review its MACT standards every eight years "taking into account developments in the practices, processes, and control technologies." 42 U.S.C. § 7412(d)(6). EPA must also evaluate the risks that remain after it implements MACT standards. Id. § 7412(f)(2)(A). The Agency promulgates stricter standards if needed to protect public health and the environment. Id.

Area sources are subject to different requirements. EPA may choose to issue area source standards based on maximum achievable control technology. But the Agency may instead promulgate area source standards based on "generally available control technologies or management practices . . . to reduce emissions of hazardous air pollutants." 42 U.S.C. § 7412(d)(5). These are called "GACT" standards. EPA was required to list, by 1995, "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation." 42 U.S.C. § 7412(c)(3).

EPA enacted regulations implementing CAA Section 112(a)(1)-(2) in 1994. See 59 Fed. Reg. 12,408 (Mar. 16, 1994). Those regulations define "major source" in terms nearly identical to the statute:

> Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants . . . .

40 C.F.R. § 63.2. Again following the statutory text, the Agency's regulations define "area source" as "any stationary source of hazardous air pollutants that is not a major source as defined in this part." Id.

The emission standards applicable to major sources of hazardous air pollutants are collected (along with any other CAA standards that apply) in sources' Title V permits. Under CAA Title V, state permitting authorities must submit to EPA a copy of each permit they propose to issue. 42 U.S.C. § 7661d(a). They must also submit each permit modification application received. Id. EPA must object to a permit or permit modification that the Agency determines does not comply with the requirements of the Act. Id. § 7661d(b)(1). If EPA does not do so within 45 days, "any person may petition the Administrator . . . to take such action." 42 U.S.C. § 7661d(b)(2). EPA has 60 days to grant or deny the petition, and a denial is subject to judicial review. Id. Moreover, if EPA itself terminates, modifies, or revokes and reissues a permit, that action is also subject to judicial review. 42 U.S.C. § 7661d(e).

If someone thinks that a source is not complying with applicable federal requirements—such as hazardous air pollutant emission standards for major sources—that person may bring suit under CAA Section 304, the citizen suit

provision. See 42 U.S.C. § 7604(a) ("any person may commence a civil action on his own behalf [ ] against any person . . . who is alleged to have violated . . . or to be in violation of an emission standard or limitation under this chapter").

II. Factual Background

A. The 1995 Guidance Memorandum

Soon after EPA began implementing MACT standards, stakeholders asked the Agency to clarify when a source can change its status from major to area by limiting its potential to emit below the 10/25 tons-per-year thresholds. See 2018 Guidance at 2 (JA XX). EPA attempted to answer that question in a 1995 guidance. See John Seitz, Potential to Emit for MACT Standards—Guidance on Timing Issues (May 16, 1995) (JA XX-XX, the "1995 Guidance").[3]

In the 1995 Guidance, EPA opined that, for purposes of the Section 112 hazardous air pollutants program, a facility could change from "major source" to "area source" status only *before* the "first compliance date"; i.e., the date on which the source would have first had to comply with an "emission limitation or other substantive regulatory requirement." 1995 Guidance at 5 (JA XX). EPA took the position that any source that was "major" on or after that date would remain "permanently" subject to MACT and other major source requirements—even if it later installed controls that reduced its hazardous air pollutant emissions below the

[3] The 1995 Guidance has been sometimes referred to as the "Seitz Memo."

10/25 tons-per-year thresholds. Id. at 5 & 9 (JA XX & XX). This was known as the "once in, always in" policy.

The 1995 Guidance was not the result of notice and comment rulemaking. It was not challenged judicially.

B. Prior efforts to revisit the 1995 Guidance

In 2003, EPA proposed amendments to the Section 112 regulatory program. Among other things, these amendments would have provided regulatory relief for major sources that reduced their emissions below the major source thresholds. See 68 Fed. Reg. 26,249 (May 15, 2003); 2018 Guidance at 3 (JA XX). One of the proposed changes would have allowed major sources that eliminate their hazardous air pollutant emissions to request that they no longer be subject to the MACT standard. 68 Fed. Reg. at 26,254-56. The 2003 proposed rule would also have allowed sources that adopted pollution prevention measures to request alternative compliance requirements, such as alternative monitoring and reporting regimes. Id. at 26,256-59. EPA did not finalize those aspects of its 2003 proposal.

In 2007, EPA proposed a rule that would have replaced the policy set forth in the 1995 Guidance. That proposed rule would have enshrined the plain language reading of the statute that EPA has now adopted. See National Emission Standards for Hazardous Air Pollutants: General Provisions, 72 Fed. Reg. 69-01 (Jan. 3, 2007). EPA explained that, "[s]ince issuance of the [1995 Guidance], EPA has received questions concerning the [once in, always in] policy and

recommendations to revise that policy." 72 Fed. Reg. at 71. For example, state and local air program administrators and officials had complained that:

> [T]he [once in always in] policy provides no incentive for sources, after the first substantive compliance date of a MACT standard, to implement [pollution prevention] measures in order to reduce their emissions to below major source thresholds because there are no benefits to be gained, e.g., no reduced monitoring, recordkeeping, and reporting, and no opportunity to get out of major source requirements.

Id. EPA had also "heard from others . . . that the [once in always in] policy serves as a disincentive for sources to reduce emission of [hazardous air pollutants] beyond the levels actually required by an applicable standard" and "does not encourage sources to explore the use of different control techniques, [pollution control], or new and emerging technologies that would result in lower emissions." Id. at 71-72.

The 2007 proposal explicitly "allow[ed] a major source . . . to become an area source at any time by limiting its [potential to emit hazardous air pollutants] to below the major source thresholds." 72 Fed. Reg. at 70. Under the 2007 proposal, sources would have been able to change their status *either* before or "after the first substantive compliance date of an applicable MACT standard so long as it limits its potential to emit below the major source thresholds." Id. at 69. EPA explained that, unlike the 1995 policy, this proposed change was "wholly consistent with the plain language of section 112(a)(1)," because "any source . . . that limits [its]

emissions to less than the major source thresholds is, by definition, not a 'major source . . . .'" Id. at 72-73.

EPA received numerous comments on the 2007 proposal. Many supported the Agency's proposed revision to the regulatory definitions of major and area sources. For example, the Steel Manufacturers Association and the Specialty Steel Industry of North America commented:

> The proposed rule would provide a significant environmental benefit while also potentially benefiting many regulated industries. Many SMA and SSINA member companies already have taken significant steps to reduce their [hazardous air pollutant] emissions. We believe that many more would follow suit if given the proper incentive.

EPA-HQ-OAR-2004-0094-0160 at 3 (JA XX). The State of Ohio Environmental Protection Agency noted:

> Many small businesses find themselves considered major sources for MACT rule applicability based only upon worst-case potential to emit calculations. Because of the current [once in, always in] policy, they are infinitely subject to a MACT rule even if their emissions decrease to negligible levels. This causes several complications including a potential for increased emissions and a disincentive to implement pollution prevention techniques.

EPA-HQ-OAR-2004-0094 at 1 (JA XX).

EPA did not take final action on its 2007 proposal to replace the once in, always in policy. But it never withdrew that proposal. 2018 Guidance at 3 (JA XX).

In 2017, Executive Order 13777, entitled "Enforcing the Regulatory Reform Agenda," invited agencies to identify regulations that were unnecessarily

burdensome, outdated, or otherwise good candidates for repeal, modification, or replacement. 82 Fed. Reg. 12,285, 12,286 (Feb. 24, 2017). EPA asked the public for input on how it should meet that directive. 82 Fed. Reg. 17,793 (Apr. 13, 2017). Many requested reconsideration of "once in, always in" policy. The South Dakota Department of Environment and Natural Resources commented that "eliminating [this] policy will promote pollution prevention by giving facilities the incentive to reduce air emissions and avoid the burden associated with a MACT standard." EPA-HQ-OA-2017-0190-44155 at 4 (JA XX). Maine's Department of Environmental Protection similarly opined:

> [T]he current policy does not provide or allow for incentive to reduce air emissions once the applicability threshold is reached. By changing the policy to allow businesses to reduce emissions to below MACT applicability levels and thereby move to a lower regulatory tier, businesses have incentives for 1) capital investments in air pollution controls to result in real reductions in air emissions; 2) innovations in processes and materials within their field which ultimately result in lower emissions; and 3) real and measurable improvements in air quality.

EPA-HQ-OA-2017-0190-46828 at 5 (JA XX).

The Department of Commerce, Office of Policy and Strategic Planning, also sought information regarding the impact of Federal Regulations on domestic manufacturing. *See* Executive Order DOC-2017-0001.[4] In response, the American Coatings Association informed the Department:

> [T]he coatings manufacturing industry has substantially reduced the use of [hazardous air pollutants] since the 1990s. In fact, many facilities subject to

[4] 82 Fed. Reg. 12,786-01 (Mar. 7, 2017).

> [MACT] are now "area source" facilities, but they still must comply with the [certain major source] requirements even though they are not major source facilities…the resources spent on compliance could be used instead for R&D, or modernization activities. This policy also acts as a disincentive for industry, since facilities have no incentive to voluntarily reduce [hazardous air pollutant] emissions below major source thresholds.

DOC-2017-0001-0100 at 4-5 (JA XX-XX).

Thus, the Agency concluded that a reconsideration of the proper reading of CAA Sections 112(a)(1)-(2) was appropriate.

C. The 2018 Guidance Memorandum

On January 25, 2018, EPA Assistant Administrator William L. Wehrum signed a memorandum to EPA's Regional Air Division Directors addressing the "Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act." 2018 Guidance at 1 (JA XX). EPA published notice of the 2018 Guidance in the Federal Register on February 8, 2018. 83 Fed. Reg. 5543-01.

The 2018 Guidance explains that the "plain language of the definitions of 'major source' in CAA section 112(a)(1) and of 'area source' in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit [ ] hazardous air pollutants [ ] below the major source thresholds." 2018 Guidance at 1 (JA XX). Such a source "will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards." Id. at 4 (JA XX).

EPA reached this conclusion based on the "plain language of the CAA." 2018 Guidance at 3 (JA XX). The Agency observed that "Congress expressly defined the terms 'major source' and 'area source' in CAA section 112(a) in unambiguous language." Id. References to the compliance date of a MACT standard—the deadline for becoming an area source under the 1995 Guidance—are "[n]otably absent." Id. Since "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit] [hazardous air pollutants] in sufficient quality to qualify as a major source," EPA itself had "no authority to do so." Id. The 2018 Guidance therefore "supersede[s]" the 1995 Guidance, and states that the "[once-in-always-in] policy in the May 1995 Seitz Memo is withdrawn, effective immediately." 2018 Guidance at 1 (JA XX).

The 2018 Guidance instructs EPA's regional offices to "send this memorandum to states within their jurisdiction." 2018 Guidance at 1 (JA XX). The Guidance explains, however, that the Agency anticipates that it will "publish a Federal Register notice to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute as discussed in this memorandum." Id. at 2 (JA XX).

D. Petitioners' challenges to the 2018 Guidance

California Communities Against Toxics, Environmental Defense Fund, Environmental Integrity Project, Louisiana Bucket Brigade, Natural Resources Defense Council, Ohio Citizen Action, and Sierra Club filed the first petition for

review of the 2018 Guidance on March 26, 2018. Petitioners Downwinders at Risk, Hoosier Environmental Council, and Texas Environmental Justice Advocacy Services filed another petition for review, No. 18-1095, on April 9, 2018. All of these petitioners are collectively referred to as the "Environmental Petitioners." The Court consolidated their challenges on April 12, 2018. Doc. #1726322.

The State of California also filed a petition for review of the 2018 Guidance (No. 18-1096) on April 9. The Court consolidated that matter with the Environmental Petitioners' challenges on April 19, 2018. Doc. #1727367.

In accordance with the schedule negotiated by the parties and entered by this Court (Doc. #1746150), on October 1, 2018, Environmental Petitioners collectively filed one proof opening brief (Doc. #1753412, the "Envtl. Br."), while California filed a separate opening brief (Doc. #1753406, the "Cal. Br.").

SUMMARY OF ARGUMENT

Because the 2018 Guidance merely communicates EPA's plain-language reading of CAA Section 112(a)(1)-(2)—which will, in turn, be applied in subsequent administrative actions—it is neither a legislative rule that required notice and comment nor a final action subject to immediate judicial review. As the Supreme Court explained in Perez v. Mortgage Bankers Association, 135 S. Ct. 1199, 1206-07 (2015), an agency's interpretation of a statute or regulation does not become a legislative rule (and thus require notice and comment) simply because it alters a prior interpretation of the same provision. Rather, so long as a guidance merely interprets the statute for the regulated community and the public, but does not directly bind the regulators or the regulated, it is neither a legislative rule requiring notice and comment nor final agency action.

Moreover, the Guidance is not the end of the Agency's decision-making process on this subject. The Agency is about to undertake a rulemaking addressing (among other things) the same interpretive issue presented here. Thus, the 2018 Guidance is not final agency action, nor is it ripe for review now. Until the Agency finalizes a rulemaking, persons can challenge EPA's reading of CAA Section 112(a)(1)-(2) in the context of individual administrative actions, such as permitting decisions. Or plaintiffs can file citizen suits challenging any source's attempt to cease complying with major source requirements if they do not go through a

process to reclassify as an area source. The Court should therefore decline to reach the merits issue raised by Petitioners and dismiss these petitions.

If the Court does reach the merits, it should uphold the Agency's straightforward reading of CAA Section 112(1)-(2). Congress' definitions of "major source" and "area source" contain no cut-off date or other temporal language having a similar effect. They therefore do not permit EPA to bar regulated sources from reclassifying from "major" to "area" (or the other way around) after a certain point in time. Congress easily could have written a cut-off into the major and area source definitions—as it did in other parts of CAA Section 112. But Congress chose not to do so, and that choice reflects Congress' clear intent that those definitions be applied as written.

Petitioners point to other parts of Section 112 in support of their argument. They claim this context implies that EPA may not allow sources to reclassify from "major" to "area" after they first comply with MACT standards. But none of those provisions conflict with the plain language of the major and area source definitions. Petitioners also argue that EPA's reading of the major and area source definitions will lead to increased hazardous air pollutant emissions. That conclusory claim lacks evidentiary support. In any event, Petitioners' contextual and policy arguments are misplaced where the statute speaks clearly. The Court should therefore uphold the plain language chosen by Congress in CAA Section 112(a) if it reaches the merits, and deny these petitions.

STANDARD OF REVIEW

Challenges to EPA's interpretation of the CAA—a statute EPA has been entrusted by Congress to administer—are governed by the two-step analysis from Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Under Chevron step one, if the text of the statute clearly and unambiguous expresses Congress' intent, that is the end of the inquiry; EPA must apply the statute as Congress wrote it. See 467 U.S. at 842-43. If the relevant statutory text is instead ambiguous, then under step two of the Chevron analysis the Court must defer to an Agency interpretation of that text so long as it is reasonable. Id.

Here, EPA believes that the relevant statutory text—the definitions of "major source" and "area source" set forth in CAA Section 112(a), 42 U.S.C. § 7412(a)—is unambiguous. Those definitions do not contain a cut-off or any other language suggesting that EPA may impose a deadline for sources to qualify as area sources by limiting their emissions below the 10/25 tons-per-year major source thresholds. In other words, EPA believes that the outcome of this matter is controlled by step one of the Chevron analysis.

If the Court were to conclude, instead, that the relevant statutory text is ambiguous, that should not bar EPA from continuing its stated course of notice-and-comment rulemaking on this issue. The Court should give EPA the opportunity to interpret that text under step two of the Chevron analysis in that upcoming rulemaking. See Negusie v. Holder, 129 S. Ct. 1159, 1167-68 (2009)

(where an agency acts based on a plain language reading and the court finds ambiguity, the appropriate course is to remand so that the agency can make "its initial determination of the statutory interpretation question"); U.S.P.S. v. Postal Regulatory Comm'n, 640 F.3d 1263, 1268 (D.C. Cir. 2011) ("[W]e remand to the Commission to address the latter issue at Chevron step 2").

ARGUMENT

I. The 2018 Guidance is neither a legislative rule nor final agency action, and the Court should therefore dismiss these petitions.

The 2018 Guidance is neither a legislative rule requiring the Agency to engage in notice-and-comment rulemaking, nor a final agency action subject to judicial review. This Court has explained that, although only finality is a jurisdictional requirement, those two issues are closely related. See Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) ("To analyze EPA's reviewability argument, we need to take a step back" and determine whether the challenged guidance is "a legislative rule, an interpretative rule, or a general statement of policy."). Thus, "[i]n litigation over guidance documents, the finality inquiry is often framed as the question of whether the challenged action is best understood as a non-final action, like a policy statement or interpretative rule, or a binding legislative rule." Ass'n of Flight Attendants-CWA v. Huerta, 785 F.3d 710, 716-17 (D.C. Cir. 2015); see also Am. Tort Reform Ass'n v. OSHA, 738 F.3d 387 (D.C. Cir 2013).

Here, the 2018 Guidance is a non-binding, interpretive document. It merely conveys the Agency's reading of CAA Section 112(a) to EPA's regional offices, states, and the public for future permitting decisions or other actions. It does not change or create law. And since the 2018 Guidance does not alter legal rights or obligations, it is not final agency action subject to judicial review.

A. The 2018 Guidance is interpretive, not legislative.

There is a fundamental distinction between agency action establishing or changing a substantive legal standard and agency action that simply interprets a statutory provision. Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). Only the former ("legislative rules") must go through notice-and-comment rulemaking, while interpretive rules need not. Id. at 313-15; Nat'l Mining, 758 F.3d at 251.

Legislative rules "have the 'force and effect of law,'" creating or changing a substantive legal standard. Chrysler Corp., 441 U.S. at 295 (citations omitted); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1055 (1987) (challenged provisions did not require notice-and-comment rulemaking because they left "unchanged" the "substantive standard for reimbursement under the Medicare statute"); Nat'l Mining, 758 F.3d at 252 ("The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.").

Interpretive rules, in contrast, reflect "the agency's construction of the statutes and rules which it administers." Mortgage Bankers Ass'n, 135 S. Ct. at 1204 (quoting Shalala v. Guernsey Mem'l Hospital, 514 U.S. 87, 99 (1995)). Rather

than creating law, they "merely clarify or explain existing law." Bowen, 834 F.2d at 1045-46 (interpretive rules). Thus, a guidance document that "merely interprets a prior statute or regulation, and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretative rule." Nat'l Mining, 758 F.3d at 252.

That is true of the guidance document challenged here. The 2018 Guidance does nothing more than inform EPA's regional offices of the Agency's reading of the CAA Section 112(a) major and area source definitions (namely, that major sources that commit to a reduction of their hazardous air pollutant emissions below the major source thresholds may be regulated as area sources). The 2018 Guidance does not directly impose (or remove) requirements applicable to sources of hazardous air pollutants. Like the guidance at issue in National Mining, the Guidance itself does not directly "tell regulated parties what they must do." 758 F.3d at 252. Rather, it informs stakeholders that EPA now reads the statute as allowing major sources to reclassify if they limit their potential to emit under the 10/25 tons per year thresholds. This reading may then be applied through individual permitting decisions by state authorities. But, again as in National Mining, "[s]tate permitting authorities are free to ignore it . . . without facing any legal consequences." Id. (internal quotation marks and citation omitted).

Petitioners nonetheless argue that, because the 2018 Guidance changed the Agency's prior interpretation of CAA Section 112(a), it is legislative, not

interpretive, and so notice and comment was required. See Cal. Br. at 23-25; Envtl. Br. at 19-22. In so arguing, Petitioners are essentially trying to resurrect the now-defunct doctrine that agencies can only change long-standing interpretations through notice and comment rulemaking. See Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997) (agency must use notice and comment procedures to issue a new interpretation of a regulation that deviates significantly from a previous interpretation). Petitioners would have this Court not only apply, but broaden, that defunct doctrine by applying it to agency interpretations of *statutes*, not just regulations.

But the Supreme Court overturned the Paralyzed Veterans doctrine in Perez v. Mortgage Bankers Ass'n, 135 S. Ct. at 1206-07. Addressing this Court's conclusion that notice and comment is required before the agency could issue a document that withdrew and contradicted a prior regulatory interpretation, the Court held that the Paralyzed Veterans doctrine "improperly imposes on agencies an obligation" beyond that imposed by the Administrative Procedure Act. Id. at 1206. In so holding, the Court rejected the argument that, when an agency changes its prior interpretation of a regulation, it has essentially amended that regulation. Id. at 1208. The Court explained that an interpretive rule cannot, by its nature, "amend" or "alter" the legal regime. Id. "One would not normally say that a court 'amends' a statute when it interprets its text." Id. That assertion is "impossible to reconcile with the longstanding recognition that interpretative rules do not have the

force and effect of law." Id. Rather, the "critical feature of interpretative rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" Id. at 1204 (quoting Guernsey Mem'l Hosp., 514 U.S. at 99). And that is exactly why EPA issued the 2018 Guidance. It informs stakeholders of the Agency's changed reading of the text of CAA Section 112(a) and the EPA regulations mirroring that text. See 2018 Guidance at n.2 & n.3 (JA XX-XX).

Since 2015, this Court has hewed to the line drawn by the Court in Perez. For example, in Sierra Club v. EPA, 873 F.3d 946, 951-53 (D.C. Cir. 2017), the Court explained that, when considering the status and reviewability of a guidance document, the basic question is "whether the challenged agency action is best understood as a non-binding action, like a policy statement or interpretative rule, or a binding legislative rule." The former (policy statements and interpretive rules) are "binding on neither the public nor the agency, and the agency retains the discretion and the authority to change its position . . . in any specific case." 873 F.3d at 951(citations and internal quotation marks omitted).

That is true here. The Agency reads CAA Section 112(a) as clearly providing that a source that limits its potential to emit to less than the 10/25 tons-per-year thresholds is outside the textual limits of the definition of "major source." There is no cut-off date. So, once a source limits its potential to emit below the statutory

thresholds, it meets the definition of an "area source" even if it was previously subject to major source requirements.

Moreover, the 2018 Guidance itself does not change the status of any source. Rather, it remains the obligation of permitting authorities to interpret the statute in response to a request to reclassify. And as described further below,[5] persons that disagree with EPA's reading of the major and area source definitions can seek to challenge the application of that reading to sources. This may occur the context of individual permitting actions (for example, by petitioning EPA to object to a revised Title V permit), or through citizen suits. In short, until EPA completes its planned rulemaking, the reading of the major and area source definitions set forth in the memo can be challenged in any "specific case" (Sierra Club, 873 F.3d at 951) that arises in the context of the reclassification of an individual source from major source to area source. And EPA itself "retains the discretion and the authority to change its position" (id.) in the upcoming rulemaking, in the context of individual reclassification actions, or elsewhere.

Petitioners argue that the 2018 Guidance is nonetheless legislative because it speaks in mandatory terms.[6] But, "[b]y its nature, an interpretative rule will often be expressed in mandatory terms" given that it conveys the Agency's view of what

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[5] See page 27-30, supra.

[6] See Cal. Br. at 18-19 (arguing that the 2018 Guidance speaks "in no uncertain terms" and "contains no equivocal or tentative language"); Envtl. Br. at 20-21.

the statute says.[7] It would be difficult for the Agency to phrase its assessment of what it thinks a statute plainly says in tentative terms.[8] Moreover, the reviewability of an agency document does not depend on what boilerplate disclaimers the agency does or does not include in that document. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

The language in the 2018 Guidance may be emphatic. But stating the Agency's view of what the statute says does not legally "command[]," require[]," "order[]" or "dictate[]" in regard to regulated sources or state permitting authorities. Appalachian Power, 208 F.3d at 1023. Sources may seek to change their status from "major" to "area" based on the plain language reading of the statute that is discussed in the 2018 Guidance. But it is up to the permitting authority to determine whether that change is appropriate.

If state regulators disagree with EPA's view of the statutory language, there is nothing in the 2018 Guidance to force them to revise sources' permits anyway.[9] Rather, "[s]tates and permit applicants may ignore the [guidance] without suffering

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[7] Ronald M. Levin, Rulemaking and the Guidance Exemption, 70 Admin. L. Rev. 263, 348 (2018).

[8] 70 Admin. L. at 348-49 ("If the agency reads the law as mandatory, it should not have to equivocate about its position. However, the fact that the agency takes the position that a statute contains a certain command does not necessarily mean that it should be entitled to enforce that position without allowing persons who disagree with its view to contest it . . . .").

[9] As discussed in Section I(B), in that event a source may ask EPA to issue it a revised permit, which would be a final agency action subject to judicial review.

any legal penalties and disabilities." Nat'l Mining, 758 F.3d at 253. Thus, as in National Mining, the challenged guidance is not a legislative rule requiring notice and comment—nor is it final action subject to judicial review.

B. The 2018 Guidance is not final agency action.

As noted above, when evaluating the finality of agency guidance documents, this Court often focuses on whether the guidance is legislative or interpretive. If it is the latter, then it is also generally not final action subject to judicial review. See Huerta, 785 F.3d at 716-17 ("The guidance . . . reflects nothing more than . . . an interpretative rule. [It] is therefore unreviewable."); National Mining, 758 F.3d at 250-53 (document labelled "Final Guidance" was not final agency action subject to review because it was an interpretive rule that did not bind regulated parties).[10]

This approach to assessing the finality of guidance memoranda makes sense. There is substantial overlap between the legislative-versus-interpretive inquiry and the traditional test for finality set forth in Bennett v. Spear, 520 U.S. 154, 177-178

[10] In rare instances, an interpretative document has nonetheless been found to be final and subject to review. For example, in Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 477-79 (2001), the Court concluded that EPA's "implementation policy" addressing which statutory requirements applied to areas that had not attained the national ambient air quality standard for ozone was final action. But there, EPA not only issued a policy document setting forth its view, but "refused in subsequent rulemakings to reconsider it, explaining to disappointed commenters that its earlier decision was conclusive." Id. at 479. Here, in contrast, the Agency will be taking comment on the interpretative issue addressed in the 2018 Guidance in an upcoming rulemaking. Thus, this is not one of the rare cases where an interpretative rule is nonetheless final action subject to judicial review.

(1997). In that case, the Supreme Court explained that agency action is final where it (1) represents the consummation of the decision-making process and (2) changes rights and obligations or has legal consequences. Id. Here, the 2018 Guidance does not alter rights or obligations for the same reason that it is merely interpretive. The memorandum only reiterates what the plain language of the Act already says (i.e., that a source of hazardous air pollutants that emits less than the 10/25 tons-per-year thresholds is an area source rather than a major source).

Moreover, the 2018 Guidance itself also does not change sources' rights or represent a final decision regarding what obligations particular sources have under Section 112. Rather, that can only happen on a source-by-source basis in the context of a permitting process or an appropriate enforcement action.

For a source to change its status from "major" to "area," it must take an enforceable limit on its potential to emit or otherwise demonstrate that its potential to emit hazardous air pollutants is below the major source thresholds. That process, which generally plays out pursuant to CAA Title V, gives the public an opportunity to challenge EPA's reading of the major and area source definitions.[11] Pending a final rule that truly does bind sources and implementing agencies, review of EPA's interpretation can occur in those permitting actions.

[11] If, as planned, EPA finalizes a rule addressing this issue, that final rule will then be binding on sources and implementing agencies. At that point, persons would no longer be able to raise this particular issue in individual permitting decisions.

As explained earlier,[12] Title V requires state permitting authorities to submit to EPA a copy of each permit modification application they receive, as well as each permit they propose to issue. 42 U.S.C. § 7661d(a)(1). EPA must object to a proposed permit if it determines that the permit does not comply with the requirements of the Act. Id. § 7661d(b)(1). If EPA does not do so within 45 days, "any person may petition the Administrator . . . to take such action." 42 U.S.C. § 7661d(b)(2). Thus, these Petitioners, or any other member of the public that does not think a major source should be permitted to change to "area" status, can petition the Agency object to the proposed permit change on that ground. EPA has 60 days to grant or deny that petition. 42 U.S.C. § 7661d(b)(2); see also 40 C.F.R. §§ 70.7(e)(4)(ii) and 70.8(d). The Agency is required to grant the petition if the petitioner demonstrates that the proposed permit change would be improper. 42 U.S.C. § 7661d(b)(2). If EPA denies the petition, that decision is subject to judicial review under CAA Section 307(b)(1), 42 U.S.C. § 7607(b)(1). Id. Thus, stakeholders will have an opportunity to address EPA's reading of the major and area source definitions when permitting authorities propose to change a source's Title V permit. In addition, Title V permitting decisions also can be challenged in state court proceedings. See 42 U.S.C. § 7661a(b)(6). There may be other avenues, beyond Title V permitting, to challenge any reclassification under state law.

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[12] See supra p.7.

Petitioners and the public may have other opportunities for review. If a state agency theoretically allowed a source to reclassify without going through the Title V process or providing an opportunity for the public to challenge the permitting decision—or if source simply ceased complying with major source requirements without going through any process to reclassify—members of the public could bring a citizen's suit. 42 U.S.C. § 7604(a)(1). In such a suit, they could seek to enforce any major source requirements that they believe should still apply.

Conversely, Petitioners have not identified a situation in which a source could seek to reclassify from "major to "area" without an opportunity for public challenge. In support of their standing declarations, Petitioners list eight facilities that have reclassified as area sources and are no longer subject to major source standards. Standing Addendum, Doc. #1753412 at 0212. They provided documentation of the permit change for only two of those. In both cases, the state permitting decision explicitly allows public challenge. Id. at 0049 & 58 ("If you wish to challenge this decision, [state regulations] require that you file a petition for administrative review. This petition may include a request for stay of effectiveness . . ."). Most of the other permit changes of which EPA is aware have been to Title V permits. As discussed above, the Title V process allows persons to petition EPA to object to revised permits, and to challenge EPA denials of such petitions.

Furthermore, states that disagree with EPA's reading of the major and area source definitions—including Petitioner California—are not compelled by the 2018

Guidance to apply that reading. Of course, a source could ask EPA to object to a permit that continues to include major source requirements under CAA Section 505(b)(2), 42 U.S.C. § 7661d(b)(2), if a state permitting agency declines to reclassify a source from "major" to "area." But if the Agency then decided to terminate, modify, or revoke and reissue a Title V permit itself, EPA's decision would again be subject to judicial review. 42 U.S.C. § 7661d(e); 40 C.F.R. §§ 70.7(g) & 71.7(g).

In short, the 2018 Guidance is not the final step here. Persons and states who disagree with the 2018 Guidance can avail themselves of Title V or other avenues to challenge the application of EPA's reading of the major source definition to individual sources. The resulting permitting decisions are the "final actions" through which sources' obligations may be altered.[13]

The 2018 Guidance is also not "final agency action"—or ripe for review by the Court at this time—because the Agency is undertaking a notice-and-comment rulemaking process. In that rulemaking, EPA will propose and take comment on regulatory text to implement the plain language reading of the statute at issue here. See 2018 Guidance at 2 (JA XX). Thus, the 2018 Guidance is not the

[13] Not only is this true of the 2018 Guidance, but it is also true of the 1995 Guidance, which Petitioners belatedly argue was also final action and a legislative rule that should have been subject to notice and comment. See Envtl. Br. at 22-23; Cal Br. at 24-25. But as here, action taken by EPA or state permitting authorities pursuant to the 1995 Guidance could have been challenged in the context of individual permitting decisions.

"consummation" of EPA's decision-making process. Bennett v. Spear, 520 U.S. at 177-78. To be clear, no such rulemaking is necessary for the reasons explained in section I.A above. The Agency's plain-language reading of Section 112(a) can be conveyed in a guidance document rather than through notice-and-comment rulemaking. But especially where EPA intends to revisit the same issue in a formal rulemaking,[14] the challenged document does not represent the end of the administrative process. It thus fails to meet the first prong of the Bennett analysis as well as the second.

In sum, this case "presents the classic institutional reason to postpone review: we need to wait for 'a rule to be applied [to see] what its effect will be.'" La. Envtl. Action Network v. Browner, 87 F.3d 1379, 1385 (D.C. Cir. 1996) (citations omitted). The effects of the 2018 Guidance will only become clear, and thus should only be challenged, either (a) in the context of individual permitting decisions or actions reclassifying a source from "major" to "area" status and allowing it to cease complying with major source obligations, or (b) when EPA completes its planned rulemaking addressing the issue raised here and explaining how the Agency's reading of the major source definition will be implemented. See

[14] EPA is preparing a proposed rule addressing the issue raised here (among other things) for transmittal to the Office of Management and Budget to start the interagency review process. The Agency anticipates that it will send the proposed rule to OMB for interagency review in the near future, and that it will sign that proposal and send it to the Federal Register for publication in the spring of 2019.

Am. Petroleum Inst. v. EPA, 683 F.3d 382 (D.C. Cir. 2012) (holding that a challenge to a rule deregulating hazardous materials was prudentially unripe in light of a proposed rulemaking to revise that rule). The Court should therefore dismiss these petitions without reaching the merits. See Nat'l Mining, 758 F.3d at 253 (ordering lower court to dismiss challenge to guidance that was interpretive and thus not final action).

II. If the Court reaches the merits, EPA's plain language reading of the statute should be upheld.

If the Court declines to dismiss these petitions, the merits question raised here is a simple one: Does the plain language of CAA Section 112(a) preclude the Agency from imposing a cut-off date for reclassification from major to area source status? The answer to that question is yes for the reasons below. The Court therefore should uphold the 2018 Guidance if it reaches the merits.

A. The text of CAA Section 112(a)(1)-(2) is clear.

The key statutory text—CAA Section 112(a)(1)'s definition of "major source"—reads as follows:

> The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

42 U.S.C. § 7412(a)(1). Notably, Congress' definition of "major source" lacks any deadline or other language that might suggest that there is a date certain by which a

source must qualify as "area" or otherwise be permanently classified and regulated as "major." See id. Congress' definition of "area source" similarly lacks any time limit. It simply provides that "any stationary source of hazardous air pollutants that is not a major source" is an "area source." Id. § 7412(a)(2).

This silence is meaningful. It is not a "gap" that the Agency can fill through Chevron Step Two interpretation. While in certain contexts statutory silence may create a gap that an agency can permissibly fill,[15] silence often has the opposite effect. It makes clear that Congress did not intend for the agency to take a particular action or impose a particular requirement.

For example, this Court so held in Backcountry Against Dumps v. EPA, 100 F.3d 147, 150 (D.C. Cir. 1996). There, the Court rejected the argument that, because a provision was silent as to its application to Indian tribes, the statute was

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[15] See Chevron, 467 U.S. at 843 (deference may be due "if the statute is silent or ambiguous . . ."). For example, in Barnhart v. Walton, 535 U.S. 212 (2002), the Court found that a provision that defined "disability" as an "inability [to work]" resulting from an "impairment . . . which has lasted" at least 12 months was ambiguous as to whether the inability to work (like the impairment) must last 12 months. Id. at 214. In that context, the Court stated that "such silence . . . normally creates ambiguity." Id. at 218. But the phrase "inability [to work]" is fundamentally ambiguous, requiring the agency to set temporal and other criteria. See id.; see also Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45-48 (2002) (agency could interpret "collected or charged . . . to mean fees that a State actually collected or charged"). Here, in contrast, Congress itself identified the criteria for discerning between major and area sources: the 10/25 tons-per-year thresholds. There is nothing in CAA Section 112(a)(1)-(2) that requires EPA to establish more requirements—or gives EPA the discretion to do so.

ambiguous. Rather, the Court concluded that the provision plainly applied to Indian tribes since it did not exempt them. Id. Similarly, in Railway Labor Executives Association v. National Mediation Board, 29 F.3d 655 (D.C. Cir. 1994) (en banc), the Court resoundingly rejected the claim that the Railway Labor Act's silence as to whether the Board could investigate representation disputes *sua sponte* allowed the agency to do so. Id. The majority found it "incredible" to suggest that the Board could do that simply because the statute did not expressly bar such action. Id. at 665 n.5. Rather, the Court opined that the statute's silence was "no ambiguity." Id. The court therefore concluded, in no uncertain terms, that a Chevron step two analysis was inappropriate:

> To suggest . . . that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power (i.e. when the statute is not written in "thou shalt not" terms), is both flatly unfaithful to the principles of administrative law outlined above, and refuted by precedent. Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.

Id. at 671 (internal citations omitted).

Similarly, in American Bus Association v. Slater, 231 F.3d 1 (D.C. Cir. 2000), this Court rejected the argument that the Department of Transportation could impose money damages against bus companies that failed to comply with the Americans with Disabilities Act because the statute did not deny it that power. But this Court held the power lacking, since it was not expressly granted. Id. at 1-6. In

a concurrence to his own majority opinion, Judge Sentelle derided the Department of Transportation's position "that that which is not forbidden is permitted." Id. at 9 (Sentelle, J. concurring). Chevron was "not even implicated" because statutory silence is not a deference-triggering ambiguity. Id. at 8. Rather, "as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency." Id.; see also Am. Bar Ass'n v. FTC, 430 F.3d 457, 468-69 (D.C. Cir. 2005) (employing canon that Congress does not hide elephants in mouse holes to conclude that silence should not be construed as authorization for the Federal Trade Commission to regulate the practice of law).

The same is true here. The CAA's silence as to when a major source can reclassify as an area source leaves no room for an interpretation that prohibits sources from doing so after a certain point in time. It is beyond EPA's power to devise a requirement out of thin air where Congress chose not to impose one.

Congress could easily have stated that a major source is any source that emits at or above the 10/25 tons-per-year thresholds "when emissions standards promulgated pursuant to subsection (d) of this section first apply," or "as of the first compliance date." Indeed, Congress demonstrated its ability to make that kind of timing distinction elsewhere in CAA Section 112. In Section 112(a)(4), Congress defined "new source" as a source "commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source." 42 U.S.C. § 7412(a)(4). Conversely, an "existing source" is "any

stationary source other than a new source." Id. § 7412(a)(10). Thus, in the very same definitional subsection of Section 112, Congress explicitly introduced a timing element of the type it eschewed in defining "major source" and "areas source."[16] The Supreme Court has repeatedly cautioned that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Dean v. United States, 556 U.S. 568, 573 (2009) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

Congress similarly demonstrated in other parts of Section 112 that it knows how to set cut-offs where it wishes to do so. See, e.g., 42 U.S.C. § 7412(i)(5)(A) (existing source can get a permit allowing it to meet alternative emission limitation instead of the applicable 112(d) standard for six years, but only if it achieves those reductions before the 112(d) standard is first proposed); see also id. § 7412(c)(4) ("[t]he Administrator may . . . list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990"). Thus, where

[16] Viewing Congress' silence on timing in defining "major" and "area" sources as creating a gap for EPA to fill would be wrong for the same reason that it would be wrong to read Congress' silence regarding emissions volume when delineating "new" from "existing" sources as giving EPA the ability to say that only sources that exceed a certain emissions volume are new sources. In both cases, Congress chose to distinguish one category from the other based on a particular attribute (emissions volume in one case, and timing of construction in the other), and EPA is not free to impose additional criteria.

Congress intended to set a cut-off (or, conversely, convey that a particular date was not a cut-off) in Section 112, it did so plainly.

Congress also said that "any" source of hazardous air pollutants emitting at or above the 10/25 tons-per-year thresholds is major, while "any" source emitting below those levels is an area source. 42 U.S.C. § 7412(a)(1), (2). The use of "any" in the major and area source definitions with no temporal limitation is another strong indication that Congress did not intend to permanently fix a source's classification as "major" or "area" based on whether sources did or did not meet a particular deadline. See New York v. EPA, 443 F.3d 880, 886 (D.C. Cir. 2006) (the CAA term "modification," defined as "any physical change" that increases a source's emissions, cannot be interpreted as limited to changes exceeding a certain magnitude because "there is no reason why any should not mean any").

Moreover, Congress used present-tense language to describe the actions that make a source "major." See 42 U.S.C. § 7412(a)(1) (a source that "emits" or "has the potential to emit" more than the 10/25 tons-per-year thresholds is major). Congress' choice of verb tense is meaningful. It supports the Agency's 2018 reading of the major and area source definitions as barring EPA from prohibiting any change of status after a source becomes subject to MACT. See Carr v. United States, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal

reach."); United States v. Wilson, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes").

Indeed, one of the most peculiar and counter-textual aspects of EPA's 1995 "once in, always in" policy is that it undermines Congress's choice of specific emission thresholds. Under that policy, a source that emits less than the 10/25 tons-per-year thresholds is nevertheless classified and regulated as "major." In essence, a once in, always in policy renders the numeric choices Congress made—after considering and negotiating the tradeoffs—inoperable soon after the hazardous air pollutant program is first applied to any particular source category. This cannot be squared with the statutory text.

In short, the Agency erred in 1995 when it imposed a cut-off date for sources to reclassify from major to area where Congress declined to do so. The 2018 Guidance rightly recognizes and redresses that interpretive misstep.

B. Petitioners' attempts to obfuscate the plain language of Section 112(a)(1)-(2) fail.

Notably, Petitioners barely address the crucial text within CAA Section 112(a) defining the terms "major source" and "area source." Instead, Petitioners strain to assert that the 2018 Guidance is inconsistent with other parts of Section 112. See Envtl. Br. at 24-37; Cal. Br. at 25-38. But where, as here, the text of a statutory provision is so clear, there is no need—and indeed it would be inappropriate—to look to other parts of the statute to interpret the provision. See

Carcieri v. Salazar, 555 U.S. 379, 393 (2009) (rejecting arguments relying on other provisions to undermine the plain meaning of definitional provision at issue).

In any event, Section 112(i)(3)(A)—the part of Section 112 on which Petitioners primarily focus this line of argument—does not conflict with the major source definition in Section 112(a)(1). Section 112(i)(3)(A) provides:

> After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category . . . which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard . . . .

42 U.S.C. § 7412(i)(3)(A).[17] Petitioners argue that this text means that the requirements applicable to sources are permanently defined at the effective date. They claim that the source can never thereafter cease complying with those requirements. See Envtl. Br. at 25-28. But that is an extreme and atextual reading of the language quoted above. Petitioners are essentially reading "has been" into the first phrase of Section 112(i)(3)(A). To do this, Congress could have written: "After the effective date of any emissions standard, limitation or regulation promulgated under this section **[that has been]** applicable to a source, no person may operate such source in violation of such standard, limitation or regulation.").

[17] In the following subsection, Congress provided that EPA may give existing sources an extra year to comply with major source standards where "necessary for the installation of controls." 42 U.S.C. § 7412(i)(3)(B).

But Congress did not use such language. The natural and reasonable reading of Section 112(i)(3)(A)—as actually written—is that a source may not violate a standard that "is" applicable to that source. See 42 U.S.C. § 7412(i)(3)(A).

To read Section 112(i)(3)(A) as saying that a source must continue to comply with a standard after the standard ceases to be applicable to it (because, for instance, that source is no longer "major" as defined in Section 112(a)(1)),[18] is not a reasonable reading. It certainly is not the only way to read that provision, as Petitioners claim. The ambiguous text in subsection (i)(3)(A) cannot serve as a basis for EPA and the Court to ignore the plain text of the major source definition in the subsection (a). 42 U.S.C. § 7412(a)(1). See Carcieri, 555 U.S. at 393 (rejecting argument that the definition of "tribe" in the Indian Reorganization Act rendered irrelevant the temporal restriction in Congress' definition of "Indian" earlier in the same subsection).

Petitioners' reading of Section 112(i)(3)(A) would also invalidate the 1995 Guidance. The 1995 Guidance allowed sources to avoid MACT standards by accepting an emission limit below the 10/25 tons-per-year thresholds between the "effective date" of a standard (referenced at the outset of Section 112(i)(3)(A) as the point at which a source's obligations are defined) and the "compliance date,"

[18] Conversely, under Petitioners' reading of Section 112(i)(3)(A), an area source that increases its emissions to above the major source thresholds would continue to be subject to area source requirements, instead of major source requirements.

which may be up to 4 years after the effective date under Section 112(i)(3)(A)-(B). If the first phrase of Section 112(i)(3)(A) has the meaning Petitioners believe, then the cut-off for becoming an area source would be the effective date, not the compliance date.[19] Thus, Petitioners' argument would invalidate the 1995 policy that they seek to reinstate by challenging the 2018 Guidance.

Petitioners also point to Sections 112(c)(3) and (c)(6) as contrary to EPA's reading of Section 112(a)(1). Envtl. Br. at 31-32. They assert this reflects a Congressional intent for sources to be "subject to continuous, permanent compliance with major-source standards." Id. But there is no real conflict here. Those provisions required EPA, by November 2000, to ensure that sources accounting for 90% of the emissions of specific pollutants were regulated by that date. 42 U.S.C. § 7412(c)(3) & (6). Insofar as Petitioners are suggesting that henceforth applying the major source definition as written may jeopardize the accuracy of those findings,[20] Petitioners can raise that concern in the planned

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[19] In the 1995 Guidance, EPA noted that this was one possible reading of that provision, but the Agency concluded that it was "reasonable to presume" that that extreme result was not what Congress intended when enacting Section 112(i)(3)—the primary thrust of which is to give regulated sources up to four years to comply with new emission standards. See 1995 Guidance at 5, JA XX.

[20] Petitioners suggest that reclassifications will change the volume of hazardous air emissions and thus impact EPA's determination that the 90% requirement(s) have been met. But changes in emissions are inherent in the standard-setting process. As soon as EPA regulates the source categories that comprise 90% of certain hazardous air pollutant emissions, those source categories no longer emit 90% of those emissions. In short, the 90% requirements set forth in 42 U.S.C. § 7412(c)(3)

rulemaking or petition the Agency to take appropriate action. But there is no direct conflict between EPA's prior obligation to make those findings and its plain language reading of the major source definition. Indeed, the broader structure of Section 112(c) affirmatively refutes that argument. Specifically, Congress recognized that the "categories and subcategories of major sources and areas sources" would in fact change over time when it directed the Administrator to "revise . . . those lists" "no less often than every 8 years. Id. § 7412(c)(1). Thus, there is no conflict between Sections 112(a)(1)-(2) and 112(c).

The same is true in regard to Section 112(f)(2), 42 U.S.C. § 7412(f)(2); the "residual risk" provision. See Envtl. Br. at 33. As with Sections 112(c)(3) and (6), that separate statutory obligation poses no direct conflict with EPA's plain-language reading of the major and area source definitions. Petitioners' view of the "legislative plan"[21] as a one-way ratchet to ever-lower hazardous air pollutant emissions cannot overcome the plain language Congress used to identify which sources are subject to which parts of that plan. See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.").

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and (6) are necessarily based on emissions that occurred at a specific point in time. Those provisions thus cannot be read as weighing against EPA's plain language reading of the major source definition simply because that reading may change (one way or the other) the total volume of hazardous air pollutants emitted.

[21] Envtl. Br. at 34 (citing King v. Burwell, 135 S. Ct. 2480, 2496 (2015)).

Finally, there is obviously no inconsistency between the Section 112(a)(1) major source definition and CAA Section 112(d), 42 U.S.C. § 7412(d). Section 112(d) addresses how EPA sets MACT standards (based on the maximum degree of emissions reduction EPA determines is achievable, which may be a complete prohibition on emissions) and how and when EPA revises those standards. See Envtl. Br. at 28-29 (citing 42 U.S.C. §§ 7412(d)(2) & (3)) and 33 (citing 42 U.S.C. § 7412(d)(6)). The question of what is MACT logically cannot control EPA's reading of the statutory text identifying the pool of sources to which MACT applies. But again, the more important point is that these contextual arguments are misplaced. Congress has spoken by defining "major source" without any cut-off date. That unambiguous choice must be honored. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

Equally misplaced are Petitioners' arguments about the impact the 2018 Guidance will have on hazardous air pollutant emissions, and thus on human health. See Envtl. Br. at 38-40; Cal. Br. at 28-31. Petitioners claim that allowing sources previously regulated as major to re-classify as area sources will result in substantial "backsliding," in contradiction of the goals of Section 112 and the CAA more broadly. Id. But as EPA learned through comments on the 2007 proposed rule and those submitted more recently, many sources have indicated that the once in, always in policy discourages them from innovating technologically to reduce

pollution.[22] While the current administrative record does not provide a basis for the court to assess the 2018 Guidance's impact on emissions, EPA intends to assess those impacts in the upcoming rulemaking. During that process, stakeholders will have the opportunity to present their views and any available data on this issue through comments. But where the statute is clear, "we need not consider . . . competing policy views"; EPA and the Court "must apply the statute according to its terms." Carcieri v. Salazar, 555 U.S. at 387, 392.

C. If Section 112(a)(1)-(2) is ambiguous, EPA must be given the first opportunity to consider how best to resolve that ambiguity.

If the Court concludes that the text of CAA sections 112(a)(1)-(2)[23] is ambiguous in regard to whether the Agency can impose a deadline for sources to reclassify from "major" to "area," the Court should allow the Agency to have the first opportunity to construe that ambiguous text. See Negusie v. Holder, 555 U.S. at 524-25 (where an agency acts based on a plain language reading and the court finds ambiguity, the appropriate course is to remand so that the agency can make "its initial determination of the statutory interpretation question"); U.S.P.S. v. Postal Regulatory Comm'n, 640 F.3d at 1268 ("[W]e remand to the Commission to address the latter issue at Chevron step 2"); Prill v. Nat'l Labor Relations Board, 755 F.2d 941, 957 (D.C. Cir. 1985) (remanding so that the Board could reconsider

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[22] Supra p.11-12.

[23] 42 U.S.C. § 7412(a)(1)-(2).

its interpretation of the statutory term "concerted activities"). EPA can then consider how best to interpret those provisions in light of the statutory context, legislative history, and the practical realities of the CAA Section 112 program in the upcoming notice-and-comment rulemaking.

CONCLUSION

For the reasons set forth in Section I above, the Court should dismiss Petitioners' challenges to the 2018 Guidance for lack of jurisdiction. If the Court does not dismiss, then it should deny these petitions on the merits for the reasons set forth in Section II above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Respondents' Initial Brief contains 11,395 words (excluding the parts of the brief exempted from the word count by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1)) as counted by the Microsoft Word software used to produce it, which is consistent with the limitation set forth in this Court's August 17, 2018 Order (Doc. # 1746150) (brief for EPA allotted 16,500 words), and is otherwise consistent with the requirements of Fed. R. App. P. 32(a)(7)(B).

/s/ *Amanda Shafer Berman*
Amanda Shafer Berman

December 21, 2018

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Initial Brief was electronically filed with the Clerk of Court on December 21, 2018, using the CM/ECF system and thereby served upon all ECF-registered counsel.

/s/ *Amanda Shafer Berman*
Amanda Shafer Berman

December 21, 2018

ATTACHMENT

(The 2018 Guidance)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act

FROM: William L. Wehrum
Assistant Administrator 1-25-18

TO: Regional Air Division Directors

This guidance memorandum addresses the question of when a major source subject to a maximum achievable control technology (MACT) standard under section 112 of the Clean Air Act (CAA) may be reclassified as an area source, and thereby avoid being subject thereafter to major source MACT and other requirements applicable to major sources under CAA section 112. As is explained below, the plain language of the definitions of "major source" in CAA section 112(a)(1) and of "area source" in CAA section 112(a)(2) compels the conclusion that a major source becomes an area source at such time that the source takes an enforceable limit on its potential to emit (PTE) hazardous air pollutants (HAP) below the major source thresholds (*i.e.*, 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAP). In such circumstances, a source that was previously classified as major, and which so limits its PTE, will no longer be subject either to the major source MACT or other major source requirements that were applicable to it as a major source under CAA section 112.

A prior EPA guidance memorandum had taken a different position. *See* "Potential to Emit for MACT Standards – Guidance on Timing Issues." John Seitz, Director, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (May 16, 1995) (the "May 1995 Seitz Memorandum"). The May 1995 Seitz Memorandum set forth a policy, commonly known as "once in, always in" (the "OIAI policy"), under which "facilities may switch to area source status at any time until the 'first compliance date' of the standard," with "first compliance date" being defined to mean the "first date a source must comply with an emission limitation or other substantive regulatory requirement." May 1995 Seitz Memorandum at 5. Thereafter, under the OIAI policy, "facilities that are major sources for HAP on the 'first compliance date' are required to comply permanently with the MACT standard." *Id.* at 9.

The guidance presented here supersedes that which was contained in the May 1995 Seitz Memorandum. The OIAI policy stated in the May 1995 Seitz Memorandum is withdrawn, effective immediately.

EPA anticipates that it will soon publish a *Federal Register* notice to take comment on adding regulatory text that will reflect EPA's plain language reading of the statute as discussed in this memorandum.

BACKGROUND

Relevant Statutory Provisions

Section 112 of the CAA establishes a multi-level regulatory structure for stationary sources of HAP, in which sources meeting a threshold amount of actual or potential HAP emissions – *i.e.*, "major sources" – are generally subject to different standards than sources with HAP emissions below the threshold.[1] Specifically, the CAA defines a "major source" to mean "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants." 42 U.S.C. § 7412(a)(1). The term "area source" is defined to mean "any stationary source of hazardous air pollutants that is not a major source." *Id.* 42 U.S.C. § 7412(a)(2).[2] In contrast to the OIAI policy, the CAA contains no provision which specifies that, if a major source wishes to switch to area source status, by taking an enforceable limit on its PTE, it must do so prior to the "first compliance date," or that a major source MACT standard will continue to apply to a former major source that, subsequent to the first compliance date, takes an enforceable limit on its PTE to below the applicable thresholds.

EPA's Past Actions

Shortly after EPA began implementing individual MACT standards through rulemaking, the agency received multiple requests to clarify when a major source of HAP could avoid the requirements applicable to major sources by taking measures to limit its PTE below the major source thresholds. In response, EPA produced the May 1995 Seitz Memorandum. At that time, EPA took the position that facilities that are major sources of HAP on the first substantive compliance date of an applicable major source MACT standard must comply "permanently" with that standard, even if the source was subsequently to become an area source by limiting its PTE. The expressed basis for this OIAI policy was that this would help ensure that required reductions in HAP emissions were maintained over time. *See* May 1995 Seitz Memorandum at 9 ("A once in,

[1] Standards for major sources are based on MACT, which is the level of control achieved by the best controlled sources in the category. *See* 42 U.S.C. § 7412 (d)(2), (d)(3). Standards for area sources may be based on MACT, but alternatively may be based on either generally available control technology (GACT) or generally available management practices that reduce HAP emissions. *Id.* 42 U.S.C. §7412(d)(2), (5).

[2] The CAA section 112 implementing regulations define "major source" and "area source" in nearly identical terms. *See* 40 CFR 63.2. ("Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence."; "Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.")

always in policy ensures that the health and environmental protection provided by MACT standards is not undermined.").

Since issuing the OIAI policy, EPA has twice proposed regulatory amendments that would have altered this interpretation. In 2003, EPA proposed amendments that focused on HAP emissions reductions resulting from pollution prevention (P2) activities. Apart from certain provisions associated with EPA's National Environmental Performance Track Program, that proposal was never finalized. *See* 68 FR 26249 (May 15, 2003); 69 FR 21737 (April 22, 2004).

In 2007, EPA issued a proposed rule to replace the OIAI policy set forth in the May 1995 Seitz Memorandum. 72 FR 69 (January 3, 2007). In that proposal, EPA reviewed the provisions in CAA section 112 relevant to the OIAI interpretation, applicable regulatory language, stakeholder concerns and potential implications. *Id.* at 71-74. Based on that review, EPA proposed that a major source that is subject to a major source MACT standard would no longer be subject to that standard, if the source were to become an area source through an enforceable limitation on its PTE. Under the proposal, major sources could take such limits on its PTE and obtain "area source" status at any time and would not be required to have done so before the "first compliance date," as the OIAI policy provided. *Id.* at 70 ("The regulatory amendments proposed today, if finalized, would replace the 1995 OIAI policy and allow a major source of HAP emissions to become an area source at any time by limiting its PTE for HAP before the major source thresholds."). EPA has never taken final action on this 2007 proposal, which has not been withdrawn.

DISCUSSION

EPA has determined that the OIAI policy articulated in the May 1995 Seitz Memorandum is contrary to the plain language of the CAA, and, therefore, must be withdrawn. Congress expressly defined the terms "major source" and "area source" in CAA section 112(a), in unambiguous language. A "major source" is a source that "emits or has the potential to emit considering controls, in the aggregate," 10 tpy or more of any single HAP or 25 tpy or more of any combination of HAP. An "area source" is defined simply to mean any stationary source that is not a "major source." The OIAI policy had envisioned a source whose PTE is *below* 10 tpy of any single HAP and 25 tpy of any combination of HAP (*i.e.*, an "area source"), but which is nevertheless subject to the requirements applicable to major sources, including major source MACT standards. Notably absent from the statutory definitions is any reference to the compliance date of a MACT standard. Furthermore, the phrase "considering controls" within the definition of "major source" indicates that measures a source adopts to lower its PTE below the major source threshold must be considered as operating to remove it from the major source category regardless of the time at which those controls are adopted.

In short, Congress placed no temporal limitations on the determination of whether a source emits or has the PTE HAP in sufficient quantity to qualify as a major source. To the extent the OIAI policy imposed such a temporal limitation (*i.e.*, before the "first compliance date"), EPA had no authority to do so under the plain language of the statute.[3]

[3] Noteworthy too is the fact that EPA, in promulgating the regulatory definitions of "major source" and "area source" contained in the General Provisions of 40 CFR part 63, copied the statutory language almost verbatim. *See*

Accordingly, EPA has now determined that a major source which takes an enforceable limit on its PTE and takes measures to bring its HAP emissions below the applicable threshold becomes an area source, no matter when the source may choose to take measures to limit its PTE. That source, now having area source status, will not be subject thereafter to those requirements applicable to the source as a major source under CAA section 112, including, in particular, major source MACT standards – so long as the source's PTE remains below the applicable HAP emission thresholds.

Nothing in the structure of the CAA counsels against the plain language reading of the statute to allow major sources to become area sources after an applicable compliance date, just as they have long been able to become area sources before the applicable compliance date. Congress defined major and area sources differently and established different requirements for such sources. The OIAI policy, by contrast, created an artificial time limit that does not exist on the face of the statute by including a temporal limitation on when a major source can become an area source by limiting its PTE.

Many commenters on EPA's 2007 proposal had expressed the view that, by imposing that artificial time limit, the OIAI policy created a disincentive for sources to implement voluntary pollution abatement and prevention efforts, or to pursue technological innovations that would reduce HAP emissions. To the extent that the OIAI policy has long discouraged facilities from identifying and undertaking such HAP emission reduction projects, by applying the statute as written as EPA is now doing, many types of sources will be afforded meaningful incentives to undertake such projects.

The Regional offices should send this memorandum to states within their jurisdiction. Questions concerning specific issues and sources should be directed to the appropriate Regional office. Regional office staff should coordinate with Ms. Elineth Torres or Ms. Debra Dalcher, Policy and Strategies Group, Sector Policies and Programs Division (D205-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541-4347 or (919) 541-2443, respectively; and email address: torres.elineth@epa.gov or dalcher.debra@epa.gov, respectively.

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note 2, *supra*. EPA did not at that time include any language in those definitions that could reasonably be construed to provide support for the OIAI policy. Accordingly, the policy is contrary not only to the plain language of the CAA (which in itself is dispositive of the policy's lawfulness), but to the plain language of EPA's own regulations.

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

REGULATIONS

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter I. Programs and Activities
Part A. Air Quality and Emissions Limitations (Refs & Annos)

42 U.S.C.A. § 7412

§ 7412. Hazardous air pollutants

Effective: August 5, 1999
Currentness

(a) Definitions

For purposes of this section, except subsection (r) of this section--

(1) Major source

The term "major source" means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants. The Administrator may establish a lesser quantity, or in the case of radionuclides different criteria, for a major source than that specified in the previous sentence, on the basis of the potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

(2) Area source

The term "area source" means any stationary source of hazardous air pollutants that is not a major source. For purposes of this section, the term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under subchapter II of this chapter.

(3) Stationary source

The term "stationary source" shall have the same meaning as such term has under section 7411(a) of this title.

(4) New source

The term "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emission standard applicable to such source.

(5) Modification

The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

(6) Hazardous air pollutant

The term "hazardous air pollutant" means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect

The term "adverse environmental effect" means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

(8) Electric utility steam generating unit

The term "electric utility steam generating unit" means any fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale. A unit that cogenerates steam and electricity and supplies more than one-third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.

(9) Owner or operator

The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(10) Existing source

The term "existing source" means any stationary source other than a new source.

(11) Carcinogenic effect

Unless revised, the term "carcinogenic effect" shall have the meaning provided by the Administrator under Guidelines for Carcinogenic Risk Assessment as of the date of enactment. Any revisions in the existing Guidelines shall be subject to notice and opportunity for comment.

(b) List of pollutants

(1) Initial list

The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

[5] A type of atom which spontaneously undergoes radioactive decay.

(2) Revision of the list

The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

(3) Petitions to modify the list

(A) Beginning at any time after 6 months after November 15, 1990, any person may petition the Administrator to modify the list of hazardous air pollutants under this subsection by adding or deleting a substance or, in case of listed pollutants without CAS numbers (other than coke oven emissions, mineral fibers, or polycyclic organic matter) removing certain unique substances. Within 18 months after receipt of a petition, the Administrator shall either grant or deny the petition by publishing a written explanation of the reasons for the Administrator's decision. Any such petition shall include a showing by the petitioner that there is adequate data on the health or environmental defects [1] of the pollutant or other evidence adequate to support the petition. The Administrator may not deny a petition solely on the basis of inadequate resources or time for review.

(B) The Administrator shall add a substance to the list upon a showing by the petitioner or on the Administrator's own determination that the substance is an air pollutant and that emissions, ambient concentrations, bioaccumulation or deposition of the substance are known to cause or may reasonably be anticipated to cause adverse effects to human health or adverse environmental effects.

(C) The Administrator shall delete a substance from the list upon a showing by the petitioner or on the Administrator's own determination that there is adequate data on the health and environmental effects of the substance to determine that emissions, ambient concentrations, bioaccumulation or deposition of the substance may not reasonably be anticipated to cause any adverse effects to the human health or adverse environmental effects.

(D) The Administrator shall delete one or more unique chemical substances that contain a listed hazardous air pollutant not having a CAS number (other than coke oven emissions, mineral fibers, or polycyclic organic matter) upon a showing by the petitioner or on the Administrator's own determination that such unique chemical substances that contain the named chemical of such listed hazardous air pollutant meet the deletion requirements of subparagraph (C). The Administrator must grant or deny a deletion petition prior to promulgating any emission standards pursuant to subsection (d) of this section applicable to any source category or subcategory of a listed hazardous air pollutant

without a CAS number listed under subsection (b) of this section for which a deletion petition has been filed within 12 months of November 15, 1990.

(4) Further information

If the Administrator determines that information on the health or environmental effects of a substance is not sufficient to make a determination required by this subsection, the Administrator may use any authority available to the Administrator to acquire such information.

(5) Test methods

The Administrator may establish, by rule, test measures and other analytic procedures for monitoring and measuring emissions, ambient concentrations, deposition, and bioaccumulation of hazardous air pollutants.

(6) Prevention of significant deterioration

The provisions of part C of this subchapter (prevention of significant deterioration) shall not apply to pollutants listed under this section.

(7) Lead

The Administrator may not list elemental lead as a hazardous air pollutant under this subsection.

(c) List of source categories

(1) In general

Not later than 12 months after November 15, 1990, the Administrator shall publish, and shall from time to time, but no less often than every 8 years, revise, if appropriate, in response to public comment or new information, a list of all categories and subcategories of major sources and area sources (listed under paragraph (3)) of the air pollutants listed pursuant to subsection (b) of this section. To the extent practicable, the categories and subcategories listed under this subsection shall be consistent with the list of source categories established pursuant to section 7411 of this title and part C of this subchapter. Nothing in the preceding sentence limits the Administrator's authority to establish subcategories under this section, as appropriate.

(2) Requirement for emissions standards

For the categories and subcategories the Administrator lists, the Administrator shall establish emissions standards under subsection (d) of this section, according to the schedule in this subsection and subsection (e) of this section.

(3) Area sources

The Administrator shall list under this subsection each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this section. The Administrator shall, not later than 5 years after November 15, 1990, and pursuant to subsection (k)(3)(B) of this section, list, based on actual or estimated aggregate emissions of a listed pollutant or pollutants, sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section. Such regulations shall be promulgated not later than 10 years after November 15, 1990.

(4) Previously regulated categories

The Administrator may, in the Administrator's discretion, list any category or subcategory of sources previously regulated under this section as in effect before November 15, 1990.

(5) Additional categories

In addition to those categories and subcategories of sources listed for regulation pursuant to paragraphs (1) and (3), the Administrator may at any time list additional categories and subcategories of sources of hazardous air pollutants according to the same criteria for listing applicable under such paragraphs. In the case of source categories and subcategories listed after publication of the initial list required under paragraph (1) or (3), emission standards under subsection (d) of this section for the category or subcategory shall be promulgated within 10 years after November 15, 1990, or within 2 years after the date on which such category or subcategory is listed, whichever is later.

(6) Specific pollutants

With respect to alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8-tetrachlorodibenzo-p-dioxin, the Administrator shall, not later than 5 years after November 15, 1990, list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards under subsection (d)(2) or (d)(4) of this section. Such standards shall be promulgated not later than 10 years after November 15, 1990. This paragraph shall not be construed to require the Administrator to promulgate standards for such pollutants emitted by electric utility steam generating units.

(7) Research facilities

The Administrator shall establish a separate category covering research or laboratory facilities, as necessary to assure the equitable treatment of such facilities. For purposes of this section, "research or laboratory facility" means any stationary source whose primary purpose is to conduct research and development into new processes and products, where such source is operated under the close supervision of technically trained personnel and is not engaged in the manufacture of products for commercial sale in commerce, except in a de minimis manner.

(8) Boat manufacturing

When establishing emissions standards for styrene, the Administrator shall list boat manufacturing as a separate subcategory unless the Administrator finds that such listing would be inconsistent with the goals and requirements of this chapter.

(9) Deletions from the list

(A) Where the sole reason for the inclusion of a source category on the list required under this subsection is the emission of a unique chemical substance, the Administrator shall delete the source category from the list if it is appropriate because of action taken under either subparagraphs (C) or (D) of subsection (b)(3) of this section.

(B) The Administrator may delete any source category from the list under this subsection, on petition of any person or on the Administrator's own motion, whenever the Administrator makes the following determination or determinations, as applicable:

(i) In the case of hazardous air pollutants emitted by sources in the category that may result in cancer in humans, a determination that no source in the category (or group of sources in the case of area sources) emits such hazardous air pollutants in quantities which may cause a lifetime risk of cancer greater than one in one million to the individual in the population who is most exposed to emissions of such pollutants from the source (or group of sources in the case of area sources).

(ii) In the case of hazardous air pollutants that may result in adverse health effects in humans other than cancer or adverse environmental effects, a determination that emissions from no source in the category or subcategory concerned (or group of sources in the case of area sources) exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source (or from a group of sources in the case of area sources).

The Administrator shall grant or deny a petition under this paragraph within 1 year after the petition is filed.

(d) Emission standards

(1) In general

The Administrator shall promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants listed for regulation pursuant to subsection (c) of this section in accordance with the schedules provided in subsections (c) and (e) of this section. The Administrator may distinguish among classes, types, and sizes of sources within a category or subcategory in establishing such standards except that, there shall be no delay in the compliance date for any standard applicable to any source under subsection (i) of this section as the result of the authority provided by this sentence.

(2) Standards and methods

Emissions standards promulgated under this subsection and applicable to new or existing sources of hazardous air pollutants shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this section (including a prohibition on such emissions, where achievable) that the Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such

emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures which--

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h) of this section, or

(E) are a combination of the above.

None of the measures described in subparagraphs (A) through (D) shall, consistent with the provisions of section 7414(c) of this title, in any way compromise any United States patent or United States trademark right, or any confidential business information, or any trade secret or any other intellectual property right.

(3) New and existing sources

The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Administrator. Emission standards promulgated under this subsection for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent than--

(A) the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate (as defined by section 7501 of this title) applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources, or

(B) the average emission limitation achieved by the best performing 5 sources (for which the Administrator has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

(4) Health threshold

With respect to pollutants for which a health threshold has been established, the Administrator may consider such threshold level, with an ample margin of safety, when establishing emission standards under this subsection.

(5) Alternative standard for area sources

With respect only to categories and subcategories of area sources listed pursuant to subsection (c) of this section, the Administrator may, in lieu of the authorities provided in paragraph (2) and subsection (f) of this section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories which provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

(6) Review and revision

The Administrator shall review, and revise as necessary (taking into account developments in practices, processes, and control technologies), emission standards promulgated under this section no less often than every 8 years.

(7) Other requirements preserved

No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title, part C or D of this subchapter, or other authority of this chapter or a standard issued under State authority.

(8) Coke ovens

(A) Not later than December 31, 1992, the Administrator shall promulgate regulations establishing emission standards under paragraphs (2) and (3) of this subsection for coke oven batteries. In establishing such standards, the Administrator shall evaluate--

(i) the use of sodium silicate (or equivalent) luting compounds to prevent door leaks, and other operating practices and technologies for their effectiveness in reducing coke oven emissions, and their suitability for use on new and existing coke oven batteries, taking into account costs and reasonable commercial door warranties; and

(ii) as a basis for emission standards under this subsection for new coke oven batteries that begin construction after the date of proposal of such standards, the Jewell design Thompson non-recovery coke oven batteries and other non-recovery coke oven technologies, and other appropriate emission control and coke production technologies, as to their effectiveness in reducing coke oven emissions and their capability for production of steel quality coke.

Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors. Notwithstanding subsection (i) of this section, the compliance date for such emission standards for existing coke oven batteries shall be December 31, 1995.

(B) The Administrator shall promulgate work practice regulations under this subsection for coke oven batteries requiring, as appropriate--

(5) Publicly owned treatment works

The Administrator shall promulgate standards pursuant to subsection (d) of this section applicable to publicly owned treatment works (as defined in title II of the Federal Water Pollution Control Act [33 U.S.C.A. § 1281 et seq.]) not later than 5 years after November 15, 1990.

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on--

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vicinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source--

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

(g) Modifications

(1) Offsets

(A) A physical change in, or change in the method of operation of, a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification, if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant (or pollutants) from such source which is deemed more hazardous, pursuant to guidance issued by the Administrator under subparagraph (B). The owner or operator of such source shall submit a showing to the Administrator (or the State) that such increase has been offset under the preceding sentence.

(B) The Administrator shall, after notice and opportunity for comment and not later than 18 months after November 15, 1990, publish guidance with respect to implementation of this subsection. Such guidance shall include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions to the ambient air of each of the pollutants listed under subsection (b) of this section sufficient to facilitate the offset showing authorized by subparagraph (A). Such guidance shall not authorize offsets between pollutants where the increased pollutant (or more than one pollutant in a stream of pollutants) causes adverse effects to human health for which no safety threshold for exposure can be determined unless there are corresponding decreases in such types of pollutant(s).

(2) Construction, reconstruction and modifications

(A) After the effective date of a permit program under subchapter V of this chapter in any State, no person may modify a major source of hazardous air pollutants in such State, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for existing sources will be met. Such determination shall be made on a case-by-case basis where no applicable emissions limitations have been established by the Administrator.

(B) After the effective date of a permit program under subchapter V of this chapter in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

(3) Procedures for modifications

The Administrator (or the State) shall establish reasonable procedures for assuring that the requirements applying to modifications under this section are reflected in the permit.

(h) Work practice standards and other requirements

(1) In general

For purposes of this section, if it is not feasible in the judgment of the Administrator to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, the Administrator may, in lieu thereof, promulgate

a design, equipment, work practice, or operational standard, or combination thereof, which in the Administrator's judgment is consistent with the provisions of subsection (d) or (f) of this section. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) Definition

For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that--

(A) a hazardous air pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State or local law, or

(B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations.

(3) Alternative standard

If after notice and opportunity for comment, the owner or operator of any source establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Numerical standard required

Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it is feasible to promulgate and enforce a standard in such terms.

(i) Schedule for compliance

(1) Preconstruction and operating requirements

After the effective date of any emission standard, limitation, or regulation under subsection (d), (f) or (h) of this section, no person may construct any new major source or reconstruct any existing major source subject to such emission standard, regulation or limitation unless the Administrator (or a State with a permit program approved under subchapter V of this chapter) determines that such source, if properly constructed, reconstructed and operated, will comply with the standard, regulation or limitation.

(2) Special rule

Notwithstanding the requirements of paragraph (1), a new source which commences construction or reconstruction after a standard, limitation or regulation applicable to such source is proposed and before such standard, limitation or regulation is promulgated shall not be required to comply with such promulgated standard until the date 3 years after the date of promulgation if--

(A) the promulgated standard, limitation or regulation is more stringent than the standard, limitation or regulation proposed; and

(B) the source complies with the standard, limitation, or regulation as proposed during the 3-year period immediately after promulgation.

(3) Compliance schedule for existing sources

(A) After the effective date of any emissions standard, limitation or regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the Administrator shall establish a compliance date or dates for each category or subcategory of existing sources, which shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard, except as provided in subparagraph (B) and paragraphs (4) through (8).

(B) The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 4-year compliance time is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under subsection (b) of this section.

(4) Presidential exemption

The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so. An exemption under this paragraph may be extended for 1 or more additional periods, each period not to exceed 2 years. The President shall report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(5) Early reduction

(A) The Administrator (or a State acting pursuant to a permit program approved under subchapter V of this chapter) shall issue a permit allowing an existing source, for which the owner or operator demonstrates that the source has achieved a reduction of 90 per centum or more in emissions of hazardous air pollutants (95 per centum in the case of hazardous air pollutants which are particulates) from the source, to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under subsection (d) of this section for a period of 6 years from the compliance date for the otherwise applicable standard, provided that such reduction is achieved before the otherwise applicable standard under subsection (d) of this section is first proposed. Nothing in this paragraph shall

preclude a State from requiring reductions in excess of those specified in this subparagraph as a condition of granting the extension authorized by the previous sentence.

(B) An existing source which achieves the reduction referred to in subparagraph (A) after the proposal of an applicable standard but before January 1, 1994, may qualify under subparagraph (A), if the source makes an enforceable commitment to achieve such reduction before the proposal of the standard. Such commitment shall be enforceable to the same extent as a regulation under this section.

(C) The reduction shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that, there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emissions reduction measures. The Administrator may allow a source to use a baseline year of 1985 or 1986 provided that the source can demonstrate to the satisfaction of the Administrator that emissions data for the source reflects verifiable data based on information for such source, received by the Administrator prior to November 15, 1990, pursuant to an information request issued under section 7414 of this title.

(D) For each source granted an alternative emission limitation under this paragraph there shall be established by a permit issued pursuant to subchapter V of this chapter an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under this paragraph. An alternative emission limitation under this paragraph shall not be available with respect to standards or requirements promulgated pursuant to subsection (f) of this section and the Administrator shall, for the purpose of determining whether a standard under subsection (f) of this section is necessary, review emissions from sources granted an alternative emission limitation under this paragraph at the same time that other sources in the category or subcategory are reviewed.

(E) With respect to pollutants for which high risks of adverse public health effects may be associated with exposure to small quantities including, but not limited to, chlorinated dioxins and furans, the Administrator shall by regulation limit the use of offsetting reductions in emissions of other hazardous air pollutants from the source as counting toward the 90 per centum reduction in such high-risk pollutants qualifying for an alternative emissions limitation under this paragraph.

(6) Other reductions

Notwithstanding the requirements of this section, no existing source that has installed--

(A) best available control technology (as defined in section 7479(3) of this title), or

(B) technology required to meet a lowest achievable emission rate (as defined in section 7501 of this title),

prior to the promulgation of a standard under this section applicable to such source and the same pollutant (or stream of pollutants) controlled pursuant to an action described in subparagraph (A) or (B) shall be required to comply with such standard under this section until the date 5 years after the date on which such installation or reduction has been achieved, as determined by the Administrator. The Administrator may issue such rules and guidance as are necessary to implement this paragraph.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter III. General Provisions

42 U.S.C.A. § 7604

§ 7604. Citizen suits

Currentness

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)

42 U.S.C.A. § 7661a

§ 7661a. Permit programs

Currentness

(a) Violations

After the effective date of any permit program approved or promulgated under this subchapter, it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter, or to operate an affected source (as provided in subchapter IV-A of this chapter), a major source, any other source (including an area source) subject to standards or regulations under section 7411 or 7412 of this title, any other source required to have a permit under parts [1] C or D of subchapter I of this chapter, or any other stationary source in a category designated (in whole or in part) by regulations promulgated by the Administrator (after notice and public comment) which shall include a finding setting forth the basis for such designation, except in compliance with a permit issued by a permitting authority under this subchapter. (Nothing in this subsection shall be construed to alter the applicable requirements of this chapter that a permit be obtained before construction or modification.) The Administrator may, in the Administrator's discretion and consistent with the applicable provisions of this chapter, promulgate regulations to exempt one or more source categories (in whole or in part) from the requirements of this subsection if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories, except that the Administrator may not exempt any major source from such requirements.

(b) Regulations

The Administrator shall promulgate within 12 months after November 15, 1990, regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include each of the following:

(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of applications.

(2) Monitoring and reporting requirements.

(3)(A) A requirement under State or local law or interstate compact that the owner or operator of all sources subject to the requirement to obtain a permit under this subchapter pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this subchapter, including section 7661f of this title, including the reasonable costs of--

(F) assure that no permit will be issued if the Administrator objects to its issuance in a timely manner under this subchapter.

(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

(7) To ensure against unreasonable delay by the permitting authority, adequate authority and procedures to provide that a failure of such permitting authority to act on a permit application or permit renewal application (in accordance with the time periods specified in section 7661b of this title or, as appropriate, subchapter IV-A of this chapter) shall be treated as a final permit action solely for purposes of obtaining judicial review in State court of an action brought by any person referred to in paragraph (6) to require that action be taken by the permitting authority on such application without additional delay.

(8) Authority, and reasonable procedures consistent with the need for expeditious action by the permitting authority on permit applications and related matters, to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 7661b(e) of this title, subject to the provisions of section 7414(c) of this title.

(9) A requirement that the permitting authority, in the case of permits with a term of 3 or more years for major sources, shall require revisions to the permit to incorporate applicable standards and regulations promulgated under this chapter after the issuance of such permit. Such revisions shall occur as expeditiously as practicable and consistent with the procedures established under paragraph (6) but not later than 18 months after the promulgation of such standards and regulations. No such revision shall be required if the effective date of the standards or regulations is a date after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this subchapter regarding renewals.

(10) Provisions to allow changes within a permitted facility (or one operating pursuant to section 7661b(d) of this title) without requiring a permit revision, if the changes are not modifications under any provision of subchapter I of this chapter and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions:[3] *Provided,* That the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different timeframe for emergencies.

(c) Single permit

A single permit may be issued for a facility with multiple sources.

(d) Submission and approval

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)

42 U.S.C.A. § 7661c

§ 7661c. Permit requirements and conditions

Currentness

(a) Conditions

Each permit issued under this subchapter shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the permitting authority, no less often than every 6 months, the results of any required monitoring, and such other conditions as are necessary to assure compliance with applicable requirements of this chapter, including the requirements of the applicable implementation plan.

(b) Monitoring and analysis

The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this chapter, but continuous emissions monitoring need not be required if alternative methods are available that provide sufficiently reliable and timely information for determining compliance. Nothing in this subsection shall be construed to affect any continuous emissions monitoring requirement of subchapter IV-A of this chapter, or where required elsewhere in this chapter.

(c) Inspection, entry, monitoring, certification, and reporting

Each permit issued under this subchapter shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this subchapter shall be signed by a responsible corporate official, who shall certify its accuracy.

(d) General permits

The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 7661b of this title.

(e) Temporary sources

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control (Refs & Annos)
Subchapter V. Permits (Refs & Annos)

42 U.S.C.A. § 7661d

§ 7661d. Notification to Administrator and contiguous States

Currentness

(a) Transmission and notice

(1) Each permitting authority--

(A) shall transmit to the Administrator a copy of each permit application (and any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator may require to effectively review the application and otherwise to carry out the Administrator's responsibilities under this chapter, and

(B) shall provide to the Administrator a copy of each permit proposed to be issued and issued as a final permit.

(2) The permitting authority shall notify all States--

(A) whose air quality may be affected and that are contiguous to the State in which the emission originates, or

(B) that are within 50 miles of the source,

of each permit application or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

(b) Objection by EPA

(1) If any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this chapter, including the requirements of an applicable implementation plan, the Administrator shall, in accordance with this subsection, object to its issuance. The permitting authority shall respond in writing if the Administrator (A) within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section, or (B) within 45 days after receiving notification under subsection (a)(2) of this section, objects in writing to its issuance

as not in compliance with such requirements. With the objection, the Administrator shall provide a statement of the reasons for the objection. A copy of the objection and statement shall be provided to the applicant.

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

(3) Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

(c) Issuance or denial

If the permitting authority fails, within 90 days after the date of an objection under subsection (b) of this section, to submit a permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of this subchapter. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection.

(d) Waiver of notification requirements

(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval of a permit program under this subchapter for any category (including any class, type, or size within such category) of sources covered by the program other than major sources.

(2) The Administrator may, by regulation, establish categories of sources (including any class, type, or size within such category) to which the requirements of subsections (a) and (b) of this section shall not apply. The preceding sentence shall not apply to major sources.

(3) The Administrator may exclude from any waiver under this subsection notification under subsection (a)(2) of this section. Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

(e) Refusal of permitting authority to terminate, modify, or revoke and reissue

If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit under this subchapter, the Administrator shall notify the permitting authority and the source of the Administrator's finding. The permitting authority shall, within 90 days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such 90 day period for an additional 90 days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or if the Administrator objects and the permitting authority fails to resolve the objection within 90 days, the Administrator may, after notice and in accordance with fair and reasonable procedures, terminate, modify, or revoke and reissue the permit.

CREDIT(S)

(July 14, 1955, c. 360, Title V, § 505, as added Pub.L. 101-549, Title V, § 501, Nov. 15, 1990, 104 Stat. 2643.)

Notes of Decisions (19)

42 U.S.C.A. § 7661d, 42 USCA § 7661d
Current through P.L. 115-231. Also includes P.L. 115-233 to 115-281, 115-283 to 115-298, 115-300 to 115-306, 115-308 to 115-319. Title 26 current through P.L. 115-319.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter C. Air Programs
Part 63. National Emission Standards for Hazardous Air Pollutants for Source Categories (Refs & Annos)
Subpart A. General Provisions (Refs & Annos)

40 C.F.R. § 63.2

§ 63.2 Definitions.

Effective: May 16, 2007
Currentness

The terms used in this part are defined in the Act or in this section as follows:

Act means the Clean Air Act (42 U.S.C. 7401 et seq., as amended by Pub.L. 101–549, 104 Stat. 2399).

Actual emissions is defined in subpart D of this part for the purpose of granting a compliance extension for an early reduction of hazardous air pollutants.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her authorized representative (e.g., a State that has been delegated the authority to implement the provisions of this part).

Affected source, for the purposes of this part, means the collection of equipment, activities, or both within a single contiguous area and under common control that is included in a section 112(c) source category or subcategory for which a section 112(d) standard or other relevant standard is established pursuant to section 112 of the Act. Each relevant standard will define the "affected source," as defined in this paragraph unless a different definition is warranted based on a published justification as to why this definition would result in significant administrative, practical, or implementation problems and why the different definition would resolve those problems. The term "affected source," as used in this part, is separate and distinct from any other use of that term in EPA regulations such as those implementing title IV of the Act. Affected source may be defined differently for part 63 than affected facility and stationary source in parts 60 and 61, respectively. This definition of "affected source," and the procedures for adopting an alternative definition of "affected source," shall apply to each section 112(d) standard for which the initial proposed rule is signed by the Administrator after June 30, 2002.

Alternative emission limitation means conditions established pursuant to sections 112(i)(5) or 112(i)(6) of the Act by the Administrator or by a State with an approved permit program.

Alternative emission standard means an alternative means of emission limitation that, after notice and opportunity for public comment, has been demonstrated by an owner or operator to the Administrator's satisfaction to achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under a relevant design, equipment, work practice, or operational emission standard, or combination thereof, established under this part pursuant to section 112(h) of the Act.

Alternative test method means any method of sampling and analyzing for an air pollutant that is not a test method in this chapter and that has been demonstrated to the Administrator's satisfaction, using Method 301 in appendix A of this part, to produce results adequate for the Administrator's determination that it may be used in place of a test method specified in this part.

Approved permit program means a State permit program approved by the Administrator as meeting the requirements of part 70 of this chapter or a Federal permit program established in this chapter pursuant to title V of the Act (42 U.S.C. 7661).

Area source means any stationary source of hazardous air pollutants that is not a major source as defined in this part.

Commenced means, with respect to construction or reconstruction of an affected source, that an owner or operator has undertaken a continuous program of construction or reconstruction or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or reconstruction.

Compliance date means the date by which an affected source is required to be in compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established by the Administrator (or a State with an approved permit program) pursuant to section 112 of the Act.

Compliance schedule means: (1) In the case of an affected source that is in compliance with all applicable requirements established under this part, a statement that the source will continue to comply with such requirements; or

(2) In the case of an affected source that is required to comply with applicable requirements by a future date, a statement that the source will meet such requirements on a timely basis and, if required by an applicable requirement, a detailed schedule of the dates by which each step toward compliance will be reached; or

(3) In the case of an affected source not in compliance with all applicable requirements established under this part, a schedule of remedial measures, including an enforceable sequence of actions or operations with milestones and a schedule for the submission of certified progress reports, where applicable, leading to compliance with a relevant standard, limitation, prohibition, or any federally enforceable requirement established pursuant to section 112 of the Act for which the affected source is not in compliance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

Construction means the on-site fabrication, erection, or installation of an affected source. Construction does not include the removal of all equipment comprising an affected source from an existing location and reinstallation of such equipment at a new location. The owner or operator of an existing affected source that is relocated may elect not to reinstall minor ancillary equipment including, but not limited to, piping, ductwork, and valves. However, removal and reinstallation of an affected source will be construed as reconstruction if it satisfies the criteria for reconstruction as defined in this section. The costs of replacing minor ancillary equipment must be considered in determining whether the existing affected source is reconstructed.

Continuous emission monitoring system (CEMS) means the total equipment that may be required to meet the data acquisition and availability requirements of this part, used to sample, condition (if applicable), analyze, and provide a record of emissions.

Hazardous air pollutant means any air pollutant listed in or pursuant to section 112(b) of the Act.

Issuance of a part 70 permit will occur, if the State is the permitting authority, in accordance with the requirements of part 70 of this chapter and the applicable, approved State permit program. When the EPA is the permitting authority, issuance of a title V permit occurs immediately after the EPA takes final action on the final permit.

Major source means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator establishes a lesser quantity, or in the case of radionuclides, different criteria from those specified in this sentence.

Malfunction means any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.

Monitoring means the collection and use of measurement data or other information to control the operation of a process or pollution control device or to verify a work practice standard relative to assuring compliance with applicable requirements. Monitoring is composed of four elements:

(1) Indicator(s) of performance—the parameter or parameters you measure or observe for demonstrating proper operation of the pollution control measures or compliance with the applicable emissions limitation or standard. Indicators of performance may include direct or predicted emissions measurements (including opacity), operational parametric values that correspond to process or control device (and capture system) efficiencies or emissions rates, and recorded findings of inspection of work practice activities, materials tracking, or design characteristics. Indicators may be expressed as a single maximum or minimum value, a function of process variables (for example, within a range of pressure drops), a particular operational or work practice status (for example, a damper position, completion of a waste recovery task, materials tracking), or an interdependency between two or among more than two variables.

(2) Measurement techniques—the means by which you gather and record information of or about the indicators of performance. The components of the measurement technique include the detector type, location and installation specifications, inspection procedures, and quality assurance and quality control measures. Examples of measurement techniques include continuous emission monitoring systems, continuous opacity monitoring systems, continuous parametric monitoring systems, and manual inspections that include making records of process conditions or work practices.

(3) Monitoring frequency—the number of times you obtain and record monitoring data over a specified time interval. Examples of monitoring frequencies include at least four points equally spaced for each hour for continuous emissions or parametric monitoring systems, at least every 10 seconds for continuous opacity monitoring systems, and at least once per operating day (or week, month, etc.) for work practice or design inspections.

(4) Averaging time—the period over which you average and use data to verify proper operation of the pollution control approach or compliance with the emissions limitation or standard. Examples of averaging time include a 3–hour average in units of the emissions limitation, a 30–day rolling average emissions value, a daily average of a control device operational parametric range, and an instantaneous alarm.

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40 C.F.R. § 70.7

§ 70.7 Permit issuance, renewal, reopenings, and revisions.

Effective: November 17, 2016
Currentness

(a) Action on application.

(1) A permit, permit modification, or renewal may be issued only if all of the following condition have been met:

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under § 70.6(d) of this part;

(ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (2) and (3) of this section, the permitting authority has complied with the requirements for public participation under paragraph (h) of this section;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 70.8(b) of this part;

(iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

(v) The Administrator has received a copy of the proposed permit and any notices required under §§ 70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under § 70.8(c) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under § 70.4(b)(11) of this part or under regulations promulgated under title IV of title V of the Act for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.

(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in § 70.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§ 70.6, 70.7, and 70.8 for significant permit modifications.

(e) Permit modification. A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(1) Program description. The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.

(2) Minor permit modification procedures—

(i) Criteria.

(A) Minor permit modification procedures may be used only for those permit modifications that:

(1) Do not violate any applicable requirement;

(2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

(3) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and

(B) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

(ii) Application. An application requesting the use of group processing procedures shall meet the requirements of § 70.5(c) of this part and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.

(B) The source's suggested draft permit.

(C) Certification by a responsible official, consistent with § 70.5(d) of this part, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(3)(i)(B) of this section.

(E) Certification, consistent with § 70.5(d) of this part, that the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.

(F) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8 of this part.

(iii) EPA and affected State notification. On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligations under §§ 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under § 70.8(b)(2) of this part to the Administrator.

(iv) Timetable for issuance. The provisions of paragraph (e)(2)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(2)(iv) (A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45–day review period under § 70.8(c) of this part, whichever is later.

(v) Source's ability to make change. The provisions of paragraph (e)(2)(v) of this section shall apply to modifications eligible for group processing.

(vi) Permit shield. The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.

(4) Significant modification procedures—

(i) Criteria. Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. The State program shall contain criteria for determining whether a change is significant. At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

(ii) The State program shall provide that significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal. The permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.

(f) Reopening for cause.

(1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 70 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to § 70.4(b)(10) (i) or (ii) of this part.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists. Such reopening shall be made as expeditiously as practicable.

(3) Reopenings under paragraph (f)(1) of this section shall not be initiated before a notice of such intent is provided to the part 70 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time period in the case of an emergency.

(g) Reopenings for cause by EPA.

(1) If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph (f) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such notification, forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this 90–day period for an additional 90 days if he finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph (g)(2) of this section or fails to resolve any objection pursuant to paragraph (g)(4) of this section, the Administrator will terminate, modify, or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days' notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraphs (g) (1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

(h) Public participation. Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:

(1) Notice shall be given by one of the following methods: By publishing the notice in a newspaper of general circulation in the area where the source is located (or in a State publication designed to give general public notice) or by posting the notice, for the duration of the public comment period, on a public Web site identified by the permitting authority, if the permitting authority has selected Web site noticing as its "consistent noticing method." The consistent noticing method shall be used for all draft permits subject to notice under this paragraph. If Web site noticing is selected as the consistent noticing method, the draft permit shall also be posted, for the duration of the public comment period, on a public Web site identified by the permitting authority. In addition, notice shall

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40 C.F.R. § 70.8

§ 70.8 Permit review by EPA and affected States.

Currentness

(a) Transmission of information to the Administrator.

(1) The permit program shall require that the permitting authority provide to the Administrator a copy of each permit application (including any application for permit modification), each proposed permit, and each final part 70 permit. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.

(2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:

(i) By regulation for a category of sources nationwide, or

(ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.

(3) Each State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.

(b) Review by affected States.

(1) The permit program shall provide that the permitting authority give notice of each draft permit to any affected State on or before the time that the permitting authority provides this notice to the public under § 70.7(h) of this part, except to the extent § 70.7(e) (2) or (3) of this part requires the timing of the notice to be different.

(2) The permit program shall provide that the permitting authority, as part of the submittal of the proposed permit to the Administrator [or as soon as possible after the submittal for minor permit modification procedures allowed under § 70.7(e) (2) or (3) of this part], shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) EPA objection.

(1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information.

(2) Any EPA objection under paragraph (c)(1) of this section shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections. The Administrator will provide the permit applicant a copy of the objection.

(3) Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:

(i) Comply with paragraphs (a) or (b) of this section;

(ii) Submit any information necessary to review adequately the proposed permit; or

(iii) Process the permit under the procedures approved to meet § 70.7(h) of this part except for minor permit modifications.

(4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act.

(d) Public petitions to the Administrator. The program shall provide that, if the Administrator does not object in writing under paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45–day review period to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in § 70.7(h) of this part, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45–day review period and prior to an EPA objection. If the permitting authority has issued a

permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in § 70.7(g) (4) or (5) (i) and (ii) of this part except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

(e) Prohibition on default issuance. Consistent with § 70.4(b)(3)(ix) of this part, for the purposes of Federal law and title V of the Act, no State program may provide that a part 70 permit (including a permit renewal or modification) will issue until affected States and EPA have had an opportunity to review the proposed permit as required under this section. When the program is submitted for EPA review, the State Attorney General or independent legal counsel shall certify that no applicable provision of State law requires that a part 70 permit or renewal be issued after a certain time if the permitting authority has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA and affected States.

AUTHORITY: 42 U.S.C. 7401, et seq.

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40 C.F.R. § 71.7

§ 71.7 Permit issuance, renewal, reopenings, and revisions.

Currentness

(a) Action on application.

(1) A permit, permit modification, or renewal may be issued only if all of the following conditions have been met:

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under § 71.6(d);

(ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (1) and (2) of this section, the permitting authority has complied with the requirements for public participation under this section or § 71.11, as applicable;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 71.8(a);

(iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

(v) In the case of a program delegated pursuant to § 71.10, the Administrator has received a copy of the proposed permit and any notices required under § 71.10(d) and has not objected to issuance of the permit under § 71.10(g) within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under § 71.4(i) or under 40 CFR part 72 or title V of the Act for the permitting of affected sources under the acid rain program, the permitting authority shall take final action on each permit application (including a request for permit modification or renewal) within 18 months after receiving a complete application.

(3) The permitting authority shall ensure that priority is given to taking action on applications for construction or modification under title I, parts C and D of the Act.

review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.

(f) Reopening for cause.

(1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 71 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions have been extended pursuant to paragraph (c)(3) of this section.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The permitting authority (or EPA, in the case of a program delegated pursuant to § 71.10) determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists, and shall be made as expeditiously as practicable.

(3) Reopenings under paragraph (f)(1) of this section shall not be initiated before a notice of such intent is provided to the part 71 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the permitting authority may provide a shorter time period in the case of an emergency.

(g) Reopenings for cause by EPA for delegated programs.

(1) In the case of a program delegated pursuant to § 71.10, if the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph (f) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such notification, forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this 90–day period for an additional 90 days if he or she finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph (g)(2) of this section or fails to resolve any objection pursuant to paragraph (g)(4) of this section, the Administrator will terminate, modify, or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days' notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraphs (g) (1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

AUTHORITY: 42 U.S.C. 7401, et seq.

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Current through Dec. 20, 2018; 83 FR 65479.

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